FADHELAH OTHMAN v. MOHAMAD SUKRI HAT & ORS

HIGH COURT MALAYA, GEORGETOWN
ANAND PONNUDURAI J
[CIVIL SUIT NO: PA-21NCvC-22-11-2022]
30 MAY 2024

Abstract – *Police officers owe common law and statutory duties to take reasonable measures to ensure the safety of detainees placed in police custody. These duties include protecting detainees from harm from others, ie, by police officers or other detainees and from self-harm, ie, self-injury and suicide. The duties extend to monitoring detainees and intervening where and when necessary to prevent potential harm, based on existing established protocols and standard operating procedures.*

TORT: *Negligence – Wrongful death – Duty of care – Claim for damages – Claim by administrator of estate of deceased against members of police force and Government of Malaysia – Deceased arrested, remanded and placed in lockup cell – Deceased found hanging by his neck in cell – Whether deceased under care, custody and control of police at material times – Whether police owed duty of care towards deceased – Extent of duty of care – Whether police had breached duty of care towards deceased – Whether there was transparent and honest investigation of deceased's death – Whether there was failure of superiors to control and/or supervise subordinates in carrying out duties and obligations – Whether alleged tortfeasors liable to pay for damages – Police Act 1967 – Police Regulations 1952 – Lockup Rules 1953*

TORT: *Misfeasance – Misfeasance in public office – Wrongful death – Claim for damages – Claim by administrator of estate of deceased against members of police force and Government of Malaysia – Deceased arrested, remanded and placed in lockup cell – Deceased found hanging by his neck in cell – Whether there was misfeasance in public office – Police Act 1967 – Police Regulations 1952 – Lockup Rules 1953*

TORT: *Vicarious liability – Negligence – Wrongful death – Duty of care – Claim for damages – Claim by administrator of estate of deceased against members of police force and Government of Malaysia – Deceased arrested, remanded and placed in lockup cell – Deceased found hanging by his neck in cell – Whether deceased under care, custody and control of police at material times – Whether police owed duty of care towards deceased – Whether there was breach of duty of care towards deceased – Whether Government of Malaysia vicariously liable for negligence of police – Government Proceedings Act 1956, ss. 5 & 6*

POLICE: *Tortious liabilities – Negligence – Wrongful death – Duty of care – Claim for damages by administrator of estate of deceased against members of police force and Government of Malaysia – Deceased arrested, remanded and placed in lockup cell – Deceased found hanging by his neck in cell – Duty of care of police to protect detainee from danger or self-injury*

The plaintiff, as the mother and the administrator of the estate of her deceased son ('deceased'), had commenced this suit against the defendants for alleged negligence and public misfeasance for the wrongful death of the deceased. The first to tenth defendants were members of the police force while the 11th defendant was the Government of Malaysia. The deceased was arrested together with one Hafeez Nashriq ('Hafeez') by the police and was remanded for a period of seven days under ss. 39B, 39A(1) and 15(1)(a) of the Dangerous Drugs Act 1952. The deceased was then placed in cell 3 of the lockup of Ibu Pejabat Polis Derah Seberang Perai Utara ('Lokap IPD SPU'). Two days later, in the early hours of the morning (between 2.55am to 3am), the deceased was found hanging by his neck in his cell. The post mortem report ascertained the deceased's cause of death as 'consistent with hanging'. Parts of the CCTV recording recorded from a mobile phone, which was tendered by the plaintiff, showed that it was the deceased who hung himself with the aid of his t-shirt and no other person was found to be involved in the hanging incident. The plaintiff's claim was based on the following causes of action: (i) negligence of the first defendant in failing to comply with the legal and statutory obligations as provided under the Police Act 1967 ('Act'), Police Regulations 1952 ('Regulations') and Lockup Rules 1953 ('Rules'), at the time of the deceased's arrest until his detention in the lockup; (ii) negligence of the second to fifth defendants arising from the omissions and non-compliance of their legal and statutory obligations under the Act, the Regulations and the Rules, the perintah tetap and the memo dated 11 October 2019 ('memo'), leading to the death of the deceased; (iii) negligence of the sixth defendant in ensuring that his subordinates, *ie*, the second to fifth defendants complied with the legal and statutory obligations provided under the Act, the Regulations, the Rules and the perintah tetap, leading to the death of the deceased; (iv) the failure of the seventh defendant in conducting a transparent investigation against the first to sixth defendants; (v) misfeasance of the defendants in public office which had led to the death of the deceased; and (vi) the vicarious liability of the eighth to 11th defendants. The defendants' defence was that: (i) it was not reasonably foreseeable that the deceased would take his own life; (ii) the deceased was not a suicide risk; (iii) the defendants were not negligent in their execution of duties; and (iv) the plaintiff was unable to prove misfeasance in public office. The issues that arose were: (i) was the deceased under the care, custody and control of the defendants when he was in the Lokap IPD SPU; (ii) if yes, whether the defendants owed a duty of care towards the deceased who was under remand and in the custody of the defendants at all material times; (iii) the extent of the duty of care and whether the defendants had breached the said duty of care towards the deceased; (iv) whether the seventh defendant had failed to investigate the death of the deceased in a transparent and honest manner; (v) whether the eighth to tenth defendants failed to control and/or supervise the other defendants in carrying out their duties and

obligations; (vi) whether the defendants as public officers had committed misfeasance in public office; (vii) whether the 11th defendant should be held vicariously liable; and (viii) whether the defendants were liable to pay damages.

Held (allowing claim against first to sixth and 11th defendants; dismissing claim against seventh to tenth defendants):

(1) The deceased and Hafeez were arrested by the first defendant and the raiding team on 20 November 2019. On 21 November 2019 at 12.50am, the deceased and Hafeez were placed in the Lokap IPD SPU. They were also placed in the same cell upon obtaining the remand order of seven days before the Magistrates' Court. Given that the defendant did not dispute the above facts, the first question was answered in the affirmative, *ie*, the deceased was under the care, custody and control of the defendants when the deceased was in the Lokap IPD SPU on 22 November 2019. (paras 16-18)

(2) There was indeed a common law and a statutory duty of care owed by police officers to take reasonable care for the safety of detainees in custody to ensure that they are not harmed by the police officers or by other detainees or harm themselves or like in this case, kill themselves. Further, based on the duties of police officers pursuant to art. 5 of the Federal Constitution, the Act, the Rules and the Regulations, as well as the cases of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd*, *Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors* and *Janagi Nadarajah & Anor v. Sjn Razali Budin & Or*s, the second issue was answered in the affirmative, *ie*, that the defendants did owe a duty of care towards the deceased who was under remand and in the custody of the defendants at all material times. The views of the defendants that the deceased was not a suicide risk was clearly one that was obviously wrong in light of the fact that the deceased subsequently hung himself. (paras 25 & 28)

(3) The defendants did owe a duty of care to the deceased to protect him from danger or self-injury. Based on the perintah tetap which had been gazetted, it could be easily discerned that there were indeed duties cast upon police officers when dealing with those detained in the lockup. It was beyond per adventure that the very purpose of the perintah tetap was to prevent detainees from committing suicide or harming themselves. It was the defendants' own evidence that they did not monitor the CCTV recordings on a 'live' basis but only referred to it for playback purposes when an incident occurs. This was a serious digression and omission and such omission clearly amounted to negligence and a breach of their duty of care to the deceased. By reason of such omission, there had been a failure by the sixth defendant to

ensure compliance of the perintah tetap and the memo by his subordinates, *ie*, the second to fifth defendants. Had the second defendant complied with the perintah tetap, the memo, the Rules and the available standard operating procedures and in particular, monitored the CCTV, the deceased's death could have been avoided. (paras 44, 59, 60, 71 & 115)

(4) The seventh defendant was the officer assigned to investigate the deceased's death. The plaintiff submitted that given that the first to sixth defendants were all colleagues of the seventh defendant, this raised red flags towards the impartiality of the seventh defendant in that his independence and objectivity towards his investigation into his colleagues with regards to the deceased's death would be called into serious question. At this juncture, the main crux of the plaintiff's claim was the alleged negligence of the defendants which they claimed led to the death of the deceased at the lockup. As such, even assuming that there were shortcomings in the investigations by the seventh defendant, there was no nexus of the same with the death of the deceased as these investigations were only undertaken after the incident. (paras 116, 117 & 123)

(5) There was no evidence adduced by the plaintiff to show that the eighth to tenth defendants had in fact failed to control and/or supervise the other defendants in carrying out their duties and obligations. The plaintiff failed to adduce sufficient evidence to show the causal link between the alleged negligence of the first to sixth defendants to the eighth to tenth defendants. There was no liability on the part of the eighth to tenth defendants. (paras 127 & 129)

(6) Whilst the plaintiff had successfully proven that the first to sixth defendants had been negligent in their statutory duties by failing to ensure the safety of the deceased, it could not be concluded that misfeasance had been proven. The plaintiff had failed to prove that the defendants had exercised their powers in bad faith with the specific intention to injure the deceased nor did they exercise their powers with reckless indifference about the consequences of such exercise. The plaintiff had failed to prove its claim of misfeasance in public office. (paras 136, 138 & 142)

(7) Applying both ss. 5 and 6 of the Government Proceedings Act 1956 as well as the cases of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* and *Bala Krishnan Appala Naudi v. Ketua Inspektor Prabakaran Shanmugam & Ors*, and since the plaintiff herein had named the actual tortfeasors in this case, having established that the first to sixth defendants were negligent in their duties leading to the death of the deceased, the 11th defendant was vicariously liable. (para 150)

(8) The plaintiff was awarded: (i) RM57,600 (RM300 x 12 months x 16 years) under the dependency claim; (ii) RM30,000 as damages for bereavement; (iii) RM50,000 being aggravated damages; (iv) RM3,000 being funeral expenses; (v) RM5,000 as costs for obtaining the grant of letters of administration; and (vi) RM2,000 as travelling costs. (paras 159, 160 & 175)

Case(s) referred to:

Bala Krishnan Appala Naidu v. Ketua Inspektor Prabakaran Shanmugam & Ors (No 2) [2011] 2 CLJ 890 HC ***(refd)***

Caparo Industries Plc v. Dickman [1990] 1 All ER 568 ***(refd)***

Chan Wey Siong lwn. Ketua Inspektor Sjafrin Oktridal Sjofjan & Satu Lagi [2004] 3 CLJ 180 HC ***(refd)***

Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal [2014] 9 CLJ 15 CA ***(refd)***

Farah Ahmed Naji Al-Sahhaf v. Dr Lee Weng Seng & Ors [2022] CLJU 3340; [2022] 1 LNS 3340 HC ***(refd)***

Ganga Gowri Raja Sundram lwn. PP [2012] 7 CLJ 180 HC ***(refd)***

Hasniyati Hassan & Anor v. Kerajaan Malaysia [2022] 7 CLJ 565 HC ***(refd)***

Janagi Nadarajah & Anor v. Sjn Razali Budin & Ors [2021] 10 CLJ 915 HC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals [2018] 1 CLJ 585 FC ***(refd)***

Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(refd)***

Kunasekaran Renggaga v. ASP Heisham Harun, Ketua Balai Polis Bukit Sentosa & Ors [2012] 4 CLJ 237 HC ***(refd)***

Lee Sau Kong v. Leow Cheng Chiang [1960] CLJU 56; [1960] 1 LNS 56 CA ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Lim Gaik Suan & Anor v. Mohamad Norhafiz Md Haron & Ors [2017] MLRHU 1926 ***(refd)***

Loh Hee Thuan v. Mohd Zani Abdullah [2003] 1 CLJ 410 HC ***(refd)***

Muhammad Norazri Abdul Aziz & Anor v. Abdul Rani Hassan & Anor [2020] CLJU 216; [2020] 1 LNS 216 HC ***(refd)***

Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors [2024] 2 CLJ 591 HC ***(refd)***

Nur Syarafina Sa'ari v. Kerajaan Malaysia & Ors [2019] 9 CLJ 246 HC ***(refd)***

Orange v. Chief Constable Of West Yorkshire Police [2001] EWCA Civ 611 ***(refd)***

Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***

Qi Qiaoxian (Claiming As The Mother And Dependent Of Qi Xiangqing, Deceased) & Anor v. Sunway Putra Hotel Sdn Bhd [2024] 5 CLJ 734 CA ***(refd)***

Reeves v. Commissioner Of Police Of The Metropolis [2000] 1 AC 360 ***(refd)***

Robinson v. Chief Constable Of West Yorkshire Police [2018] UKSC 4 ***(refd)***

Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ Supp 39 HC ***(refd)***

Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir' [2011] 9 CLJ 426 HC ***(refd)***

Sanmarkan Ganapathy & Anor v. Dato' Dr V Thuraisingham & Ors [2011] CLJU 1090; [2011] 1 LNS 1090 HC ***(refd)***

A *Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor [1999] CLJU 83; [1999] 1 LNS 83 HC* ***(refd)***
Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors [2017] 5 CLJ 84 HC ***(refd)***
Sushila Rani Ramasamy lwn. Kerajaan Malaysia & Yang Lain [2023] CLJU 1358; [2023] 1 LNS 1358 HC ***(refd)***
B *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC* ***(refd)***
Zaidi Mohd Zain & Anor v. PP [2021] 6 CLJ 905 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(2), (3)(ii), (iv)(d), (3A)
C Dangerous Drugs Act 1952, ss. 15(1)(a), 39A(1), 39B
Evidence Act 1950, ss. 101, 102, 103, 114(g)
Federal Constitution, art. 5
Government Proceedings Act 1956, ss. 5, 6
Lockup Rules 1953, r. 10

D *For the plaintiff - Visvanathan, Sanjay Nathan & Pushan Qin Nathan; M/s Saibullah M V Nathan & Co*
For the defendants - Nur Ezdiani Roleb & Syafiq Affandy Hassan; SFC

Reported by Lina E

JUDGMENT

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Anand Ponnudurai J:

Introduction

[1] This is yet another tragic case involving the death of a person whilst under police detention/custody. The plaintiff, as the mother and the administrator of the estate of her deceased son, one Mohd Fadzrin bin Zaidi (hereinafter referred to as "the deceased"), has commenced this present suit against the defendants for alleged negligence and public misfeasance for the wrongful death of her deceased son, who was found hung at the police lockup at Ibu Pejabat Polis Daerah Seberang Perai Utara on 22 November 2019.

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[2] In determining whether the plaintiff's claim is with merits or otherwise, I will herein below set out the salient background facts, the issues to be tried, the parties' respective contentions/submissions, the evidence adduced and my analysis of the same.

H **The Salient Background Facts**

[3] The salient background facts can be gleaned from the pleadings filed as well as the evidence led during trial and is summarised as follows.

[4] It is an undisputed fact that on 20 November 2019, the deceased was arrested together with one Hafeez Nashriq bin Sukry (hereinafter referred to as "Hafeez") by the police at No. 2255, Kampung Perlis, 12100 Butterworth, Pulau Pinang and was remanded for a period of seven days under ss. 39B, 39A(1) and 15(1)(a) of the Dangerous Drugs Act 1952.

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[5] The deceased was then placed in Cell 3 of the lockup of Ibu Pejabat Polis Daerah Seberang Perai Utara (hereinafter referred to as "IPD SPU").

[6] It is undisputed that on 22 November 2019, in the early hours of the morning (between 2.55am to 3am), the deceased was found hanging by his neck in his cell. The post-mortem report by the forensics pathologist has ascertained the deceased's cause of death as "consistent with hanging".

[7] Parts of the CCTV recording recorded from a mobile phone were tendered by the plaintiff in court whereby having viewed the same, there is no disputing that it was the deceased who hung himself with the aid of his t-shirt and that no other person was found to be involved in the hanging incident.

The Plaintiff's Claim

[8] The plaintiff's claim, as pleaded, is based on the following causes of action:

(i) negligence of the first defendant in failing to comply with the legal and statutory obligations as provided under the Police Act 1967, Police Regulations 1952, Lockup Rules 1953 at the time of the arrest until the detention of the deceased in the lockup.

(ii) negligence of the second to fifth defendants arising from the omissions and non-compliance of the legal and statutory obligations as provided under the Police Act 1967, Police Regulations 1952, Lockup Rules 1953, perintah tetap, memo dated 11 October 2019 leading to the death of the deceased.

(iii) negligence of the sixth defendant in ensuring that his subordinates *ie*, the second to fifth defendants complied with the legal and statutory obligations as provided under the Police Act 1967, Police Regulations 1952, Lockup Rules 1953, perintah tetap and memo dated 11 October 2019 leading to the death of the deceased.

(iv) the failure of the seventh defendant in conducting a transparent investigation against the first to sixth defendants.

(v) misfeasance of the defendants in public office, which had led to the death of the deceased.

(vi) the eighth to 11th defendants to be held vicariously liable.

The Defendants' Defence

[9] The defendants' defence as pleaded is as follows:

(i) that it was not reasonably foreseeable that the deceased would take his own life;

(ii) that the deceased was not a suicide risk;

(iii) that the defendants were not negligent in their execution of duties; and

(iv) that the plaintiff is unable to prove misfeasance in public office.

Trial

[10] A trial was conducted over four days with the following witnesses testifying:

The Plaintiff's Witnesses

(i) Fadhelah binti Othman (SP1 – the mother of the deceased and administrator of the deceased's estate);

(ii) Abdul Aziz bin Sulaiman (SP2 – Pengerusi Surau Kampung Perlis, Butterworth); and

(iii) Mohd Fadzli bin Zaidi (SP3 – the deceased's older brother).

The Defendants' Witnesses

(i) SD1 – Inspector Mohamad Sukri bin Hat (the first defendant);

(ii) SD2 – ASP Mohamad Adam Daniyal bin Abdullah (the Ketua Balai Polis) (the sixth defendant);

(iii) SD3 – Corporal Jannatul Naim bin Abdul Manab (the second defendant);

(iv) SD4 – Constable Derison bin Pingot (the third defendant);

(v) SD5 – Corporal Ramilah binti Superman (the fifth defendant);

(vi) SD6 – Dr Chandroth Navin Pankajakshan (medical officer that conducted post-mortem); and

(vii) SD7 – ASP Winston anak Raip (the seventh defendant).

Issues To Be Tried

[11] Parties have agreed before trial that the following are the issues that require judicial determination:

(i) was the deceased under the care, custody and control of the defendants when he was in the Lokap Ibu Pejabat Polis Daerah Seberang Perai Utara ("Lokap IPD SPU") on 22 November 2019;

(ii) if yes, whether the defendants owed a duty of care towards the deceased who was under remand and in the custody of the defendants at all material times;

(iii) whether the defendants have breached the said duty of care towards the deceased;

(iv) whether the defendants have failed to ensure the safety and wellbeing of the deceased whilst he was under the care and custody of the defendants;

(v) were the defendants negligent and derelict in their duties in ensuring the safety and wellbeing of the deceased whilst in detention;

(vi) whether the deceased's death is attributed to the acts/omissions of the defendants;

(vii) whether the defendants as public officers had committed misfeasance in public office at the material time;

(viii) whether the defendants have breached their statutory duties at the material time;

(ix) whether the seventh defendant had failed to investigate the death of the deceased in a transparent and honest manner;

(x) whether the eighth, ninth and tenth defendants had failed to control and/or supervise the other defendants in carrying out their duties and obligations;

(xi) whether the 11th defendant is vicariously liable for all the acts, omissions, negligence, dereliction of duties, breach of statutory duties and misfeasance in public office;

(xii) whether the plaintiff has successfully proven her claim as pleaded in the statement of claim on a balance of probabilities;

(xiii) if yes, are the defendants liable to pay damages as pleaded in the statement of claim.

Parties' Respective Contentions/Submissions

The Plaintiff's Contentions/Submissions

[12] The plaintiff's contentions/submissions are summarised as follows:

(i) that there was a violation of the deceased's right to life under art. 5 of the Federal Constitution;

(ii) that the defendants owed a duty of care towards the deceased and have breached their duty of care leading to the death of the deceased;

(iii) that the negligence, omissions and dereliction of duties in their role had contributed to the death of the deceased;

(iv) that there were discrepancies with the time signatures in the CCTV recordings *ie*, delayed by 25 to 30 minutes from the actual time;

(v) that there is non-compliance of the mandatory rules provided under the Lockup Rules 1953 and the memo dated 11 October 2019;

(vi) that the CCTV recording only shows the hanging incident and not any of the incidents prior to the said hanging and the deliberate refusal to adduce the entire CCTV recordings would invoke the adverse inference pursuant to s. 114(g) of the Evidence Act 1950;

(vii) that the death of the deceased could have been avoided had the defendants complied with the Lockup Rules 1953, the perintah tetap as well as memo dated 11 October 2019.

The Defendants' Contentions/Submissions

[13] The defendants' contentions/submissions are summarised as follows:

(i) that the deceased was in good health and no injuries were sustained by the deceased during his detention;

(ii) that the deceased hung himself on his own will and not due to the defendants' negligence;

(iii) that the defendants did not breach their duty of care towards the deceased;

(iv) that the defendants owed a duty of care towards the deceased but only a general duty of care as custodian for the prisoner's health and safety;

(v) that the duty of care only exists if the deceased is a suicide risk;

(vi) that the 11th defendant should not be held vicariously liable as the plaintiff had failed to establish personal liability of the tortfeasors named *ie*, the first to tenth defendants.

Analysis

[14] I will herein below deal with the abovementioned issues separately. However, before I proceed to do so, I am mindful that it is trite law that he who asserts must prove the particular facts he alleges.

[15] As such, the burden of proof lies on the plaintiff throughout the trial to prove her claim on a balance of probabilities that the defendants have been negligent and committed the tort of misfeasance, leading to the death of the deceased in the lockup. (See ss. 101, 102 and 103 of the Evidence Act 1950 and the case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 3 MLRA 501).

Issue No. 1: Was The Deceased Under The Care, Custody And Control Of The Defendants When He Was In The Lokap Ibu Pejabat Polis Daerah Seberang Perai Utara ("Lokap IPD SPU") On 22 November 2019

[16] It is an undisputed fact that the deceased and one Hafeez were arrested by the first defendant and the raiding team on 20 November 2019.

[17] It is the defendants' case that on 21 November 2019 at 12.50am, the deceased and Hafeez were placed in the lockup cell 3. They were also placed in that same cell upon obtaining the remand order of seven days (21 November 2019 to 27 November 2019) before the Magistrates' Court.

[18] Given that the defendants do not dispute the above facts, the first question is answered in the affirmative *ie*, I find that the deceased was under the care, custody and control of the defendants when the deceased was in the Lokap IPD SPU on 22 November 2019.

Issue No. 2: If Yes, Whether The Defendants Owed A Duty Of Care Towards The Deceased Who Was Under Remand And In The Custody Of The Defendants At All Material Times?

[19] It is trite law that the three essential elements to sustain an action for negligence are: (i) the existence of a duty to take care owing to the plaintiff by the defendants; (ii) breach of the duty of care; and (iii) damage suffered by the plaintiff as a result of the breach.

[20] In this respect, I refer to the case of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958, where the Court of Appeal enunciated as follows:

> [67] Negligence is a tort and three things must be proved to support the claimant's claim:
>
> (a) that the defendant owes the claimant plaintiff a duty of care;
>
> (b) that the defendant is in breach of that duty of care; and
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> (c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.

[21] No doubt, the detention itself may be lawful in the sense that there may have been a valid basis for the deceased's arrest. However, the crux of this matter is not about the arrest or the lawfulness of the detention or remand order but whether the detaining authorities owe a duty of care to the detainees including the deceased whilst they are in detention in the police lockup.

[22] The extent of a duty owed to detainees/prisoners, and by extension, to persons in custody stems from the fact that they have been deprived of their liberty and taken into custody by the authorities. This duty extends to take reasonable care for the safety of the person in custody and such duty includes the duty to ensure the safety of the person in custody and to ensure that they do not harm themselves or commit suicide.

[23] In *Reeves v. Commissioner Of Police Of The Metropolis* [2000] 1 AC 360, the House of Lords held that the police did indeed owe a duty of care to the deceased to take reasonable care to prevent him from committing suicide. Lord Hoffman held as follows:

> The police and prison service have long been aware that prisoners are more than usually likely to attempt suicide or self-injury. ...
>
> The risk of suicide is particularly high among prisoners on remand facing a new environment and an uncertain future.

A *The duty, as I have said, is a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives.*

Because the police were under a duty to take reasonable care not to give Mr Lynch the opportunity to kill himself, *the common sense answer to the question whether their carelessness caused his death is "Yes".* (emphasis added)

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[24] In *Lim Gaik Suan & Anor v. Mohamad Norhafiz Md Haron & Ors* [2017] MLRHU 1926, Abdul Wahab JC (as His Lordship then was) adopted the *dicta* in *Reeves* (*supra*) and held that the police owed a duty of care to the deceased who had hung himself in the police station and that the police had breached their duty of care. Abdul Wahab JC enunciated as follows:

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[23] In view of the above authorities, I am of, the considered view that the issue is not about the lawfulness of the arrest and/or detention of the Deceased but whether the Defendants as detaining officers owed a duty of care to the Deceased whilst he was under the detention of the Defendants at the Police Station. *On this issue, I agree with the Plaintiffs submission that the Defendants owed the Deceased a duty of care to ensure that the Deceased, whilst under the custody of the police, was safe from harm and/or self-harm.* The only question remained to be determined by this court was whether or not the Defendants had breached their duty of care towards the Deceased.

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[43] *It has long been recognised in the case of Reeves cited above that person placed in a lock-up cell was almost certainly being subjected to abnormal stresses which he would be liable to cause him to act irrational fashion and do things which he would not normally contemplate; he may suffer impulses which he would not normally suffer.*

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[44] *The Defendants were under a duty to ensure that the Deceased was safe from any harm inflicted by others and/or himself. It was this exact duty that the Defendants had failed to comply with, which had led to the custodial death of the Deceased.* The risk of suicide being a foreseeable risk in the circumstances of the present case, I am therefore of the considered view that the Defendants in failing to prevent the suicide act of the Deceased whilst he was under their custody, care and control was thus negligent in the carrying of their police duty.

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(emphasis added)

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[25] Based on the abovementioned cases, it is clear that there is indeed a common law and a statutory duty of care owed by police officers to take reasonable care for the safety of detainees in custody to ensure that they are not harmed by the police officers or by other detainees or harm themselves or like in this case, kill themselves. (See also the case of *Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors* [2017] 5 CLJ 84; [2017] 9 MLJ 300).

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[26] It is also relevant that I refer to art. 5 of the Federal Constitution, the Police Act 1967, Police Regulations 1952 and the Lockup Rules 1953 thereunder, which governs the duties of the police officers in respect of detainees. In this regard, I would refer to the case of *Janagi Nadarajah & Anor v .Sjn Razali Budin & Ors* [2021] 10 CLJ 915; [2021] MLJU 2023, where the High Court examined and highlighted the duties of the police officers towards detainees as follows:

> [6] Article 5 of the Federal Constitution guarantees the Deceased's right to life and liberty. The Deceased had not yet been charged, tried or convicted for any crime. The Deceased had been arrested and detained for an alleged drug offence pursuant to section 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985.
>
> [7] section 20 of the Police Act 1967 ("Police Act") outlines the general duties of police officers. This includes a duty to give "assistance in the protection of life and properly" pursuant to section 20(3)(i) thereof. Further, section 20(3)(m) read together with section 20(4) deems a police officer "guarding prisoners and other persons in the custody of the police" as a prison officer with corresponding powers and duties.
>
> [8] The *Lockup Rules 1953 ("Lockup Rules")*, *inter alia*, provides for medical inspection on admission. *Rule 10* reads:
>
> > *The Medical Officer shall so far as possible examine every prisoner as soon as possible after admission to a lockup and shall certify whether the prisoner is fit for imprisonment and, if convicted the class of labour which he can perform.*
>
> [9] The *Lockup Rules* provide for notification without delay to the Medical Officer of "any case of apparent mental disorder or of injury to or illness of any prisoner" (rule 36). *And for the entry in a journal of the Medical Officer's "comments on the state of the lockup and the prisoners confined therein" (rule 38). The journal that is be maintained must record "all matters and occurrences of importance, including the number of prisoners in custody after each meal, and these entries shall be dated and signed daily" (rule 34).* Assessment as to the health condition and life of a prisoner is to be made by the Medical Officer pursuant to *rule 40* which reads: "Whenever the Medical Officer is of the opinion that the life of any prisoner will be in danger by his continued confinement in a *lockup* or that any prisoner is totally and permanently unfit for confinement, he shall immediately state his opinion and the grounds thereof in writing …". Notices in 4 different languages setting forth the facilities to which prisoners are entitled as regards, *inter alia*, "the provision of medical assistance" shall be displayed at the entrance to each *lockup (rule 14).* Subordinate police officers and constables "shall at all times be responsible for the safe custody of prisoners under their charge" (rule 42).

A [10] The police also have a duty to abide by the Police Regulations 1952 ("Police Regulations"). Under regulation 2(a) thereof, a police officer is guilty of an offence against discipline if he:

(a) "is idle or negligent in the performance of his duty, or ... smokes while on duty;" (paragraph 38);

B (b) "... neglects to make any entry in any official record, register, book or other document which it is his duty to make;" (paragraph 46); or

(c) "neglects to render any assistance to any person taken ill or injured ..." (emphasis added)

C **[27]** A perusal of the defendants' submission will reflect that they do concede that a general duty of care is owed to all inmates, including the deceased as custodian but on the facts of this case, it is the defendants' submission that they did not breach such duty of care as the deceased was not a suicide risk.

D **[28]** Accordingly, having considered the duties of the police officers pursuant to art. 5 of the Federal Constitution, the Police Act 1967, Lockup Rules 1953 and Police Regulations 1952, as well as the cases of *Projek Lebuh Raya Utara-Selatan Sdn Bhd* (*supra*), *Selvi Narayan* (*supra*) and *Janagi* (*supra*), I find that the second issue is answered in the affirmative *ie*, that the defendants E do owe a duty of care towards the deceased, who was under remand and in the custody of the defendants at all material times. However, the crucial issue in this case is the extent of such duty and whether or not the defendants have breached the same. At this juncture, I would state that the views of the defendants that the deceased was not a suicide risk was clearly one that was F obviously wrong in light of the fact that the deceased subsequently hung himself.

Issue No. 3: The Extent Of The Duty Of Care And Whether The Defendants Have Breached The Said Duty Of Care Towards The Deceased?

G **[29]** Having established that there is a duty of care towards the deceased whilst in detention, the crux of this present case is the extent of such a duty and whether the defendants have breached the same in relation to the deceased. To determine this issue, one needs to consider the rival contentions of the parties as well as to consider the evidence led and in particular, the H roles played by the various defendants in the lockup at the material time.

[30] Further, in light of the fact that the agreed issues (iii), (iv), (v), (vi) and (vii) above all relate to whether or not the defendants were negligent in their duties by allegedly failing to ensure the safety of the deceased which attributed to his death, I will proceed to consider these issues collectively I under this heading.

Rule 10 Of The Lockup Rules 1953

[31] First and foremost, it is the plaintiff's case that the deceased was never examined by a medical officer as soon as possible after admission in the said lockup. This duty appears to be mandated under r. 10 of the Lockup Rules 1953, which provides as follows:

> The Medical Officer shall so far as possible examine every prisoner as soon as possible after admission to a lockup and shall certify whether the prisoner is fit for imprisonment and, if convicted the class of labour which he can perform. (emphasis added)

[32] The plain reading of the above rule and the usage of the word 'shall' suggests that the medical examination of a detainee and obtaining a certification is mandatory.

[33] In this case, it is not disputed that the deceased was not sent for a medical examination whilst under police detention and no certification was ever obtained as to his fitness for imprisonment. However, the defendants at para. 30 of their written submission contend that from the evidence of SP1, SP3, SD2 and SD3, the deceased appeared healthy and no injuries were sustained and thus, there was no requirement for extra care or to send the deceased for a medical examination.

[34] However, in my view, irrespective of the fact that the deceased appeared to be healthy, that does not absolve the defendants of their mandatory obligations to send the deceased for medical examination as provided under the Lockup Rules 1953.

[35] Further, it is critical to note that SD2 (ASP Mohamad Adam Daniyal bin Abdullah), who was the Ketua Balai Polis having overall supervision of the lockup, had affirmed that there was non-compliance of r. 10 of the Lockup Rules 1953. SD2 testified as follows during cross-examination:

> PP: Soalan pertama saya adalah berkenaan kaedah-kaedah lokap. Kaedah 10 Lokap rules ataupun kaedah-kaedah lokap **memandatkan** bahawa setiap suspek yang hendak dimasukkan ke dalam lokap perlu menjalani pengesahan doctor ataupun **medical check-up.** Setuju?
>
> SD2: **Terpulang kepada Kesihatan OKT tersebut.**
>
> PP: Dalam kes ini, sebagai penjaga lokap, Fadzrin simati dalam kes ini telah menjalani pemeriksaan perubatan sebelum dimasukkan ke dalam lokap?
>
> SD2: Tidak ada.
>
> PP: Perkara ini tidak mematuhi kaedah - kaedah lokap, setuju?
>
> SD2: Setuju.
>
> (See page 67 of the Notes of Proceedings dated 27th November 2023). (emphasis added)

[36] Similarly, SD1, Inspector Mohamad Sukri bin Hat (the first defendant) also admitted that he had failed to comply with r. 10 of the Lockup Rules when he admitted that the deceased was not sent for medical examination at the material time.

[37] Learned counsel for the plaintiff contends that it can be reasonably inferred that the deceased's arrest would have been an extremely stressful event, which was exacerbated by the actions of SD1 and the rest of the arresting officers and given the murky circumstances surrounding the deceased's arrest coupled with the amount of drugs supposedly seized from the deceased and Hafeez, it is reasonable to infer that this would have caused extreme anguish and mental distress to the deceased.

[38] Learned counsel for the plaintiff submits that without such medical assessment being done, the "eggshell skull rule" would apply and the defendants take the deceased as he finds him. The plaintiff also relies on the case of *Nik Mohd Suhaimi Ahmad Ghazali v. Siti Fairuz Shamsuri & Ors* [2024] 2 CLJ 591, where Ahmad Bache J held as follows:

> [53] This new approach by the court must be recognised and is timely as it is built on the foundation of fairness, reasonableness, justice and respect to this group of vulnerable suspects/detainees. *This resonates with the application of the eggshell skull rule and the call that the time has come for society and officers of investigation and law enforcement agencies (like MACC and police) to recognise the rights of these vulnerable suspects/arrestees as they are, at the extreme of the spectrum are susceptible to suffer from mental health which can cause them to even take away their own life (see Teoh Beng Hock's case).* (emphasis added)

[39] In my view, there is certainly merit in the contention that all persons arrested would be under a certain level of stress after being detained. It is for this very reason I suspect that the Lockup Rules 1953 mandates that a medical examination to be conducted by a medical officer. In this regard, the medical examination would enable the deceased's mental and physical health to be assessed. In this regard, as held by the House of Lords in the case of *Reeves* (*supra*), the police ought to indeed be aware that prisoners are more than usually likely to attempt suicide or harm themselves.

[40] Similarly, adopting the findings of Nantha Balan J (as His Lordship then was) in the case of *Selvi Narayan* (*supra*) to the present case, the Lockup Rules 1953 are undoubtedly a complete code which governs the handling and management of detainees so that they would be safe from harm or self-harm if the detaining authorities abide by the Lockup Rules 1953 and ensure that they are fully complied with. In my opinion, the failure to ensure that the deceased was examined by a medical officer soonest possible is an indication that such omission was a breach of their duty of care towards the deceased.

Non-compliance Of The Perintah Tetap Ketua Polis Daerah Seberang Perai Utara

[41] Following closely on the heels of the plaintiff's submission that there has been non-compliance with the Lockup Rules 1953, is the plaintiff's submission that there has also been non-compliance by the defendants of a perintah tetap.

[42] For ease of reference, a copy of the perintah tetap is reproduced as follows:

PERINTAH TETAP
KETUA POLIS DAERAH
SEBERANG PERAI UTARA

NO. WARTA: PU (B) 404
TARIKH WARTA: 18 SEPT. 2008
JUMLAH OKT WARTA : 300 OKT

PERINTAH TETAP UNTUK MENAHAN
ORANG TAHANAN DI BILIK TAHANAN/LOKAP

1. Perintah Tetap ini hendaklah dibaca bersama dengan:

   1.1 Peraturan-peraturan Lokap Polis - HT KPNA 120

2. **Tujuan:**

   Perintah Tetap ini dirangka bagi menentukan langkah-langkah keselamatan berikut dipatuhi sepenuhnya:

   Mencegah dari kejadian atau tindakan atau percubaan melarikan diri oleh mana-mana juga orang tahanan dalam mana-mana juga bilik tahanan untuk melepaskan diri dari tahanan yang sah dengan apa juga cara/helah.

   Mencegah orang-orang tahanan daripada membunuh diri atau mencederakan diri

   Menentukan keselamatan dinding-dinding bilik kurungan, pintu kurungan. penjaring-penjaring bilik kurungan sentiasa berada dalam keadaan baik, berkunci bagi maksud menahan mana-mana orang tahanan yang sedang dikurung.

3. **Peraturan Am**

   Ketua Polis Daerah adalah Pegawai Penjaga Lokap dan bertanggungjawab diatas pentadbiran dari masa ke semasa dan juga menguatkuasakan peraturan-peraturan lokap.

   Ketua Polis Balai adalah sebagai Timbalan Pegawai Penjaga Lokap/ Bilik Tahanan dan bertindak seperti di para 3.

4. **Jenis-jenis Tahanan:**

   Kategori orang-orang tahanan yang boleh dikurung atau ditahan didalam lokap Polis terdiri dari mereka-mereka seperti dibawah:

4.1 Mereka yang telah dituduh di mahkamah atas sesuatu kesalahan dan tidak boleh dijamin.

4.2 Mereka yang dituduh melakukan sesuatu kesalahan tetapi setelah ditawarkan jamin tidak dapat mengadakan jamin.

4.3 Mereka yang telah dijatuhkan hukuman penjara dalam jangka masa pendek oleh mana-mana mahkamah (biasanya tidak melebihi dari 30 hari) dan mendapat arahan penahanan lokap Polis.

4.4 Mereka yang diperintahkan oleh mahkamah untuk ditahan dibawah sek. 117 KPJ mengikut tempoh remand dan lama masa kebenaran berkuasa. Mereka yang ditahan mengikut mana-mana juga peruntukan undang-undang bagi sesuatu tempoh tertentu tanpa dihadapkan ke mahkamah umpamanya Undang-Undang Mencegah Jenayah dan Akta Keselamatan Negeri (ISA).

5. **Cara-cara Penempatan Orang-orang Tahanan Didalam Lokap**

Penempatan orang-orang tahanan serta jumlah orang-orang tahanan yang perlu ditahan adalah sebagaimana yang diwartakan. Ini termasuk jumlah sebenar orang-orang tahanan yang boleh ditahan didalam lokap pada suatu masa mengikut warta tersebut. Peraturan penempatan orang-orang tahanan ini juga perlu diasingkan antara satu dengan lain berasaskan kewujudkan keadaan jenis serta watak seseorang pesalah:

Mereka yang telah dihukum oleh mana-mana mahkamah.

Mereka yang telah mengaku salah dan menunggu tarikh hukuman dijatuhkan.

Mereka yang masih menunggu perbicaraan.

Mereka yang lazim melakukan kesalahan-kesalahan jenayah.

Mereka yang pemabuk.

Mereka yang gila atau disyaki menghidap penyakit gila.

Kategori-kategori orang-orang tahanan yang disebutkan diatas hendaklah diasingkan bagi mengelakkan sesuatu tindakan buruk berlaku atau pengaruh mempengaruhi di antara sesama orang tahanan yang di tahan didalam lokap.

6. **Tahanan-tahanan Perempuan.**

Orang-orang tahanan perempuan wajib diasingkan dari tahanan lelaki. Ini bertujuan bagi mengelakkan sesuatu kejadian yang tidak diingini.

Apabila tahanan-tahanan perempuan ditempatkan didalam lokap, maka pengawalnya hendaklah dijalankan oleh seseorang anggota Polis Wanita dan hendaklah diperiksa oleh anggota Polis Wanita juga.

7. **Orang-orang Tahanan Perempuan Bersama Anak.**

Adalah termaktub didalam Peraturan-Peraturan Penjara yang membolehkan seseorang tahanan perempuan membawa anaknya yang berumur 3 tahun ke bawah bersama-samanya ke dalam lokap. Sebelum seseorang tahanan perempuan yang bersama anaknya dilokapkan, maka kedua-duanya perlu diperiksa oleh doktor Kerajaan terlebih dahulu bagi menentukan sama ada mereka sesuai, maka mereka hendaklah dikurung di lokap hospital dan dikawal.

Peraturan ini juga dikenakan sekiranya seseorang tahanan perempuan itu hamil. Jika pihak doktor Kerajaan memutuskan bahawa tahanan perempuan bersama anaknya boleh dikurung di dalam lokap Polis, maka adalah tanggungjawab Ketua Polis Balai menentukan bahawa segala kebajikan anak kecil itu dan ibunya di ambil perhatian termasuklah bekalan susu, pakaian dan makanan bagi anak itu.

8. **Tahanan Kanak-kanak (Juvana)**

Pesalah kanak-kanak (Juvana) hendaklah diasingkan dari tahanan dewasa. Ini termasuk tahanan Juvana Ordinan Darurat (E/O) 5/69 (POPO) yang perlu juga diasingkan bilik kurungan dari tahanan-tahanan dewasa.

9. **Tanggungjawab Ketua Polis Balai.**

Ketua Polis Balai adalah dipertanggungjawabkan sebagai Penolong Pegawai Penjaga Lokap. Tanggungjawab ini meliputi perkara-perkara seperti berikut

9.1 **Penyeliaan Dokumen:**

Ini adalah penyediaan dokumen secara langsung oleh Ketua Polis Balai terhadap apa jua dokumen berkaitan dengan sesuatu tahanan didalam lokap, antaranya:

9.1.1 **Borang Pol. 56 (Pin. 10/77)**

Ketua Polis Balai hendaklah menentukan bahawa keseluruhan butir-butir yang dikehendaki dalam Pol. 56 dicatat dengan lengkap. Tandatangan pegawai yang menyerah juga tandatangan orang tahanan yang menerima barang-barang atau harta kepunyaannya sewaktu ditahan atau dibebas hendaklah dicatit.

9.1.2 **Borang Pol. 84**

Ketua Polis Balai juga bertanggungjawab menentukan bahawa Daftar Lokap (Pol. 84) diselenggarakan dengan betul serta dikemaskinikan.

9.1.3 **Remand**

Remand tahanan sama ada bagi tahanan dibawah seksyen 117 KPJ, hendaklah sentiasa disemak bagi menentukan tempoh tahanannya tidak melebihi dari jangka masa yang ditetapkan oleh pihak berkuasa mahkamah.

A

9.1.4 **Borang Court 131**

Bilamana seseorang tahanan telah dihukum oleh mana-mana mahkamah supaya menjalani hukuman penjaranya di lokap Polis, maka Ketua Polis Balai bertanggungjawab mengembalikan Warrant of Commitment (Borang Court 131) kepada mahkamah berkenaan setelah tamat tempoh dipenjarakan.

B

9.2 **Mengadakan Lawatan/Pemeriksaan**

9.2.1 Ketua Polis Balai dikehendaki membuat lawatan sekali sebelah siang dan sekali sebelah malam atau awal pagi pada setiap pagi.

C

9.2.2 memeriksa setiap bilik kurungan keadaan dinding bilik kurungan jaring-jaring terpasang di lubang udara setiap bilik kurungan bagi menentukan keselamatannya.

9.2.3 Memeriksa tandas-tandas, wayar letrik bagi menentukan tiada yang rosak, bocor yang mana boleh membahayakan orang-orang tahanan ataupun yang boleh memberi peluang kepada mereka untuk melarikan diri

D

9.2.4 Memeriksa makanan/minuman pada waktu-waktu bekalannya dihantar oleh pembekal bagi menentukan ianya selamat dimakan dan tiada apa-apa senjata, rokok, dadah dibawa disembunyikan dalam sebarang bungkusan makanan yang dihantar.

E

9.2.5 Ketua Polis Balai juga bertanggungjawab menguruskan keselamatan orang-orang tahanan sewaktu pemindahan dari satu lokap ke lokap yang lain ataupun ke penjara.

F

9.2.6 Menyediakan kain selimut serta lain-lain kelengkapan yang dibenarkan dibawah peraturan-peraturan lokap. Ini termasuklah keperluan yang dibenarkan oleh undang-undang dan peraturan lokap ke atas seseorang tahanan perempuan dan kanak-kanak.

G

9.2.7 Melarang mana-mana orang awam dari memasuki kawasan lokap untuk sesuatu perjumpaan/pertemuan dengan orang tahanan. Satu bilik khas berhampiran dengan lokap yang mana didapati sesuai dari segi keselamatan boleh dijadikan tempat untuk perjumpaan/pertemuan mana-mana orang tahanan.

H

9.2.8 Kawalan lokap dilipatgandakan/diperketatkan sekiranya bekalan letrik terputus secara tiba-tiba/mengejut.

9.2.9 Menentukan langkah-langkah keselamatan diambil supaya orang-orang tahanan tidak dapat mengambil kesempatan untuk melarikan diri apabila berlaku kegemparan dalam kawasan Balai.

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9.2.10 Mengemukakan pengaduan yang munasabah yang diterima daripada orang-orang tahanan ke pengetahuan Ketua Polis Daerah.

9.3 **Layanan Ke Atas Orang Salah/Tahanan:**

9.3.1 Makanan/Minuman:

9.3.1.1 Ketua Polis Balai Bertanggungjawab menentukan bahawa pembekalan makanan/minuman kepada orang-orang tahanan disenggarakan mengikut sukatan-sukatan yang dibenarkan dari masa ke semasa berpandukan kepada kontrak pembekalan.

9.3.1.2 Ketua Polis Balai juga hendaklah menentukan supaya pembekalan makanan/minuman ke atas mana-mana orang tahanan yang melanggar peraturan lokap dicatukan.

9.3.1.3 Sebarang makanan/minuman selain dari yang terkandung didalam pembekalan makanan yang dikhususkan sebagaimana dalam kontrak adalah dilarang sama sekali kecuali setelah mendapat izin daripada Pegawai Penjaga Lokap (Ketua Polis Daerah).

9.3.1.4 Menentukan masa makan/minum setiap hari diterima mengikut jadual dan masa yang dipersetujui dalam kontrak pembekalan makanan lokap.

9.3.2 **Membuat Kerja/Kemudahan**

9.3.2.1 Orang-orang tahanan yang telah dihukum oleh mahkamah boleh diperintahkan membuat kerja-kerja sejumlah tidak lebih dari 7 1/2 jam sehari mengikut jenis-jenis kerja yang ditentukan oleh Ketua Polis Daerah.

9.3.2.2 Mereka yang ditahan untuk membantu siasatan sesuatu kes atau menunggu perbicaraan tidak boleh ditugaskan membuat kerja-kerja kecuali yang berupa membersihkan bilik-bilik kurungan mereka ataupun halaman lokap sahaja.

9.3.2.3 Mereka yang ditahan boleh dibenarkan menulis surat kepada keluarga mereka dengan syarat surat itu diperiksa oleh Ketua Polis Daerah sendiri atau seorang Pegawai Kanan yang mewakili Ketua Polis Daerah.

9.3.2.4 Mereka yang ditahan dan keputusan kesnya belum lagi selesai dibolehkan menemui keluarga mereka dengan syarat mendapat surat kebenaran daripada Pegawai Penjaga Lokap dan jika diizinkan seorang pegawai hendaklah ada semasa pertemuan tersebut diadakan ditempat/bilik yang selamat dalam halaman lokap.

9.3.2.5 Jika didapati mana-mana orang tahanan itu mengadu bahawa dia sakit, luka atau mengalami sebarang kecederaan akibat punca yang tidak diketahui atau sebaliknya hendaklah dibawa ke hospital dan eskot diaturkan secukupnya.

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9.3.2.6 Orang-orang tahanan boleh dibenarkan membuat Laporan Polis berhubung apa-apa kejadian yang berlaku ke atasnya. Ketua Pegawai hendaklah serta merta menerima repot polis tersebut dan memaklumkan kepada Ketua Polis Daerah sebelum apa-apa siasatan dijalankan.

B

9.3.3 **Kebersihan**

9.3.3.1 Ketua Polis Balai hendaklah menentukan dan memastikan bahawa bilik-bilik kurungan, bilik-bilik mandi dan tandas-tandas di lokap sentiasa bersih.

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9.3.3.2 Orang-orang tahanan hendaklah diberi kemudahan membersihkan tubuh badan, pakaian, dan rambut mereka digunting pendek serta bercukur. Pakaian hendaklah ditukarkan sekurang-kurangnya seminggu sekali.

10. **AM**

10.1 **Penggunaan Kekerasan**

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Adalah menjadi tanggungjawab Ketua Polis Balai menentukan bahawa orang-orang tahanan tidak dipukul/dicederakan dalam mana-mana keadaan berikut:

10.1.1 Semasa orang-orang tahanan dikurung didalam lokap.

E

10.1.2 Semasa orang-orang tahanan dibawa keluar untuk siasatan lanjut oleh mana-mana pegawai/anggota yang mengendalikan kes yang melibatkan orang tahanan tersebut.

11. **Tahanan Politik**

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Semua tahanan bagi kes-kes politik, tugas dan tanggungjawab Ketua Polis Balai adalah sama dalam perkara-perkara lain kecuali lawatan, siasatan yang mana ianya akan dikendalikan oleh pihak Cawangan Khas.

12. **Tugas Dan Tanggungjawab Ketua Pengawal Lokap**

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Ketua Pengawai Lokap adalah bertanggungjawab terus kepada Ketua Polis Balai di dalam menentukan keselamatan lokap. Di antara tugas dan tanggungjawab yang perlu dilaksanakan adalah seperti berikut:

12.1 Memeriksa orang-orang tahanan di dalam bilik kurungan **setiap sejam sekali**

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12.2 Semasa menjalankan pemeriksaan, tumpuan perlu diberi kepada keadaan tandas-tandas, dinding-dinding, tingkap-tingkap berjaring didalam bilik kurungan menentukan keselamatannya.

12.3 Ketua Pengawai Lokap hendaklah bersama-sama dengan Pengawai memeriksa bangunan Lokap, bilik kurungan yang terdapat orang-orang tahanan sebelum serah menyerah tugas dijalankan.

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12.4 Menyemak Buku Daftar Lokap bagi mengesahkan segala butir-butir catatan berhubung keluar/masuk mana-mana orang tahanan dibuat dengan betul serta dikemaskini

12.4 Menentukan setiap Orang Kena Tuduh yang masih lagi dalam siasatan hanya dibenarkan dibawa keluar dari lokap setelah mendapat kebenaran bertulis daripada Pegawai Penyiasat kes berkenaan.

12.5 Menentukan pakaian orang tahanan adalah sekadar yang boleh dipakai dan tidak melebihi yang sepatutnya di mana seseorang tahanan itu berpeluang melakukan sesuatu angkara jenayah sama ada ke atas dirinya atau ke atas orang tahanan perempuan dilakukan oleh Pegawai yang bertugas.

12.6 Memeriksa orang tahanan dengan teliti sebelum dimasukkan ke dalam lokap bagi mencegah apa-apa senjata dan barang larangan dibawa masuk ke dalam lokap. Pemeriksaan orang tahanan perempuan dilakukan oleh pengawal wanita.

12.7 Mencatatkan semua barang peribadi setiap orang tahanan dicatit dalam Pol. 56 dan menentukan ianya disimpan dengan selamat serta ditandatangani serah menyerah barang tersebut di atas orang Tahanan/Ketua Pengawai.

12.8 Mencatit setiap pergerakan keluar/masuk mana-mana orang tahanan sama ada ke bilik siasatan atau ke mahkamah dalam jadual lokap Pol. 84.

12.9 Bertanggungjawab memeriksa badan setiap pengawai waktu tukar ganti pengawal bagi menentukan tiada sebarang surat/barang salah diseludup masuk/keluar dari dalam bilik kurungan.

12.10 Bagi memastikan kebersihan lokap, Ketua Pengawai hendaklah mengarahkan orang-orang tahanan membersihkan bilik-bilik kurungan dan sekitar lokap.

12.11 Tiada dibenarkan sama sekali Ketua Pengawai meninggalkan tempat tugas sehingga pengganti tiba dan segala urusan serah menyerah tugas dijalankan dengan teliti dan teratur.

12.12 Semua pergerakan Orang Kena Tuduh/Orang Tahanan hendaklah dicatitkan dalam Buku Perharian balai dengan butiran seperti berikut:

12.12.1 Pkt/No/Nama Pegawai yang mengambil keluar mana-mana Orang Kena Tuduh/Orang Tahanan.

12.12.2 Tempat Orang Kena Tuduh/Orang Tahanan dibawa.

12.12.3 Keadaan serta tanda-tanda fizikal Orang Kena Tuduh/Orang Tahanan semasa dibawa keluar dan juga semasa dibawa masuk kembali ke dalam lokap.

12.12.4 Pkt/No/Nama Pegawai yang membawa masuk mana-mana Orang Kena Tuduh/Orang Tahanan.

Adalah menjadi tanggungjawab Ketua Pengawai melaporkan terus kepada Ketua Polis Balai diatas apa-apa kerosakan lokap, bekalan lekrtik terputus dsb agar langkah keselamatan selanjutnya dapat diambil.

Mana-mana Orang Kena Tuduh/Orang Tahanan yang ditangkap oleh Jabatan/Agensi selain dari PDRM hendaklah mendapat kebenaran Ketua Polis Daerah atau pada ketiadaannya Timbalan Ketua Polis Daerah Sebelum diberi kelulusan/kebenaran memasukkan mana-mana Orang Kena Tuduh/Orang Tahanan ke dalam bilik kurungan.

Ketua Pegawai bertanggungjawab memantau CCTV sepanjang tempoh diberi kelulusan/kebenaran memasukkan mana-mana Orang Kena Tuduh/Orang Tahanan ke dalam bilik kurungan penugasan dijalankan.

13. **Tanggungjawab Pengawal Lokap**

13.1 Pengawai Lokap hendaklah berpakaian seragam lengkap tanpa memakai senjatapi

13.2 Tidak dibenarkan sama sekali berbual dengan mana-mana Orang Tahanan.

13.3 Tidak dibenarkan sama sekali meninggalkan bilik kurungan tanpa pengganti.

13.4 Tidak dibenarkan membawa rokok, menghisap rokok atau apa barang larangan termasuk juga apa jua makanan/minuman semasa menjalankan tugas mengawal.

13.5 Tidak dibenarkan mana-mana orang awam atau saudara mara Orang Tahanan berjumpa/berbual dengan Orang Tahanan tersebut kecuali dengan kebenaran Ketua Polis Daerah atau Pegawai yang bertanggungjawab ke atas mana-mana Orang Tahanan berkenaan.

13.6 Tidak dibenarkan menyeludup masuk sebarang surat, bahan bacaan ataupun apa juga benda kepada atau daripada mana-mana Orang Tahanan.

13.7 Pengawai lelaki dilarang sama sekali menghampiri bilik kurungan perempuan.

13.8 Membuat pemeriksaan/pemerhatian rapi lebih kurang 1/2 jam sekali terutamanya semasa hujan lebat bagi mengelakkan cubaan oleh mana-mana Orang Tahanan untuk melarikan diri.

13.9 Bertanggungjawab membuat Catatan lawatan/pemeriksaan bilik kurungan dalam Buku Perharian Balai

13.10 Melaporkan kedudukan Orang Tahanan di dalam lokap kepada mana-mana Pegawai yang membuat lawatan/rondaan.

14. **Cara Menerima/Mengeluarkan Orang Tahanan Dari Lokap**

Peraturan-peraturan berikut hendaklah dipatuhi semasa menerima/mengeluarkan Orang Tahanan didalam lokap.

14.1 Apabila menerima Orang Tahanan, Orang Tahanan tersebut hendaklah digari tangannya ke belakang dan dibawa masuk ke bilik pengawal dan kunci semula pintu besar. Setelah selesai pemeriksaan fizikal dan semua catatan dibuat barulah pintu kedua dibuka untuk memasukkan Orang Tahanan tersebut ke dalam bilik kurungan.

14.2 Apabila mana-mana Orang Tahanan hendak dibawa keluar mestilah masuk ke bilik pengawal dan setelah persiapan dibuat dan Orang Tahanan tersebut digari, barulah pintu besar pertama dibuka dan dikunci semula. Tidak dibenarkan sama sekali anak kunci ditinggalkan bergantung kepada mangsa sama ada berkunci ataupun tidak.

14.3 Anak kunci Pintu besar pertama hendaklah disimpan di Pejabat Pertanyaan. Ketua Pejabat Pertanyaan adalah bertanggungjawab membuka dan mengunci pintu besar pertama kecuali dalam keadaan sibuk di mana tugas tersebut hendaklah diberikan kepada penolongnya.

Ingatan

Pintu Masuk Bilik Kurungan
Tidak Dibenarkan Masuk Sama Sekali Terbuka Pada Bila-bila Masa Kecuali Semasa Hendak Memasukkan Atau Mengeluarkan Orang Tahanan Sahaja.

14.4 Sebarang kelalaian, kecuaian mana-mana anggota yang dipertanggungjawabkan ke atas kawalan lokap sama ada dengan sengaja tidak mematuhi mana-mana perenggan, hukuman ini akan dikenakan tindakan-tindakan berikut:

14.4.1 Tindakan tatatertib atau

14.4.2 Dituduh di mahkamah dibawah sek. 223 KK atau

14.4.3 Ditahan kerja serta merta sehingga keputusan penyiasatan diketahui.

Nota:

Kecuaian Mengikut Takrif Perintah Ini Termasuklah/Cubaan Mana-mana Orang Tahanan Membunuh Diri/Atau Telah Membunuh Diri Di Mana Ia Dianggap (Shall Be Persurned) Bahawa Anggota Bertugas Mengawal Lokap Pada Waktu Itu Telah Cuai Menjalankan Tugas.

...

(Hj Noorzainy bin Hj Mohd Noor) ACP 04 Disember, 2017
Ketua Polis Daerah
Seberang Perai Utara
Pulau Pinang

(emphasis added)

[43] The applicability of the said perintah tetap to the facts of this case is not disputed. In this regard, the following can be gleaned from the perintah tetap:

(i) its purpose was to "mencegah orang-orang tahanan daripada membunuh diri atau mencederakan diri".

(ii) as per r. 12.1, there was a need to "memeriksa orang-orang tahanan di dalam bilik kurungan setiap sejam sekali".

(iii) that r. 12.12.4 provides "Ketua Pengawal bertanggungjawab memantau CCTV sepanjang tempoh penugasan dijalankan".

(iv) that r. 14.4 provides sebarang kelalaian, kecuaian mana-mana anggota yang dipertanggungjawabkan ke atas kawalan lokap sama ada dengan sengaja tidak mematuhi mana-mana perenggan, hukuman ini akan dikenakan tindakan-tindakan berikut:

(a) tindakan tatatertib atau;

(b) dituduh di mahkamah dibawah s. 223 KK atau;

(c) ditahan kerja serta merta sehingga keputusan penyiasatan diketahui.

(v) the note at the very end states as follows: "kecuaian mengikut takrif perintah ini termasuklah cubaan mana-mana orang tahanan membunuh diri atau telah membunuh diri di mana ia dianggap (shall be presumed) bahawa anggota bertugas mengawal lokap pada waktu itu telah cuai menjalankan tugas."

[44] From the above perintah tetap which has been gazetted, it can be easily discerned that there are indeed duties cast upon the police officers when dealing with those detained in the lockup. It is beyond per adventure that the very purpose of the perintah tetap was to prevent detainees from committing suicide or harming themselves.

[45] It is the cornerstone of the plaintiff's submission in this case that the hanging of the deceased could have been avoided had it not been for the omissions by the defendants and, in particular, the non-compliance with the various regulations and perintah tetap. In order to fully appreciate this submission, it is necessary to consider the defendants' evidence in a bit more detail to establish if indeed it was such non-compliance, which led to the death of the deceased.

[46] I will now proceed to consider the testimony and evidence of the defendants' witnesses to determine if the relevant regulations and duties have been complied with in this case and if there was non-compliance, whether such non-compliance amounts to negligence, which contributed to the death of the deceased.

SD2 – ASP Mohamad Adam Daniyal bin Abdullah (The Sixth Defendant)

[47] SD2 was the Ketua Balai Polis with overall supervision of the lockup, where the deceased was held at the material time. A CCTV recording only for a short period was produced and it transpired at trial that there were serious discrepancies in the time signatures of such recordings. SD2 attempted to explain such discrepancies of the time signatures in the CCTV recordings when he testified that the time shown in the recordings was delayed by about 25 to 30 minutes when compared to the actual time (see p. 65 of the notes of proceedings dated 27 November 2023). However, I note that this fact was never pleaded in the statement of defence and as such, remains a bare assertion and more importantly, the defendants have not produced any expert or forensic testimony to corroborate this issue relating to time discrepancies of the CCTV recordings.

[48] Paragraph 1.5 of the said memo issued by SD2 himself (see pp. 84 to 85 Bundle B) dated 11 October 2019 expressly states as follows:

> Memastikan CCTV sentiasa berfungsi serta keselamatan tahanan lokap terkawal. Sekiranya ada kerosakkan di dalam lokap, penyelia hendaklah mengemukakan laporan bergambar kepaada KPB serta dicatitkan dalam station diary.

[49] As such, bearing in mind that there were issues and time discrepancies in the CCTV recordings, it is clear that the CCTV was not functioning properly and there was a failure to ensure that the CCTV were properly maintained at all material times.

[50] Further, according to SD2, there were three screens in the control room with each screen measuring 16 inches only. He, however, testified that such monitor screens are also placed way too high up on the wall for any of the officers on duty to see clearly what is happening in the lockup.

[51] Crucially and shockingly, the second defendant testified that the CCTV was merely considered as a "playback" device and does not serve to show the live feed of the lockup (see p. 85 of the notes of proceedings dated 27 November 2023) and that they would review the CCTV recordings only after an incident had occurred. Quite apart from this fact not being pleaded, it is clear that there has been a digression from the perintah tetap which mandates that the ketua pengawal to "memantau" (which means supervise) "sepanjang tempoh penugasan dijalankan". In fact, the pleaded case of the defendants at para. 12(f) of the statement of defence states as follows:

> Pergerakan si mati di dalam lokap sentiasa dipantau melalui rakaman kamera litar tertutup (selepas ini dirujuk sebagai "CCTV") sepanjang si mati berada dalam tahanan dan salinan CCTV akan dikemukakan semasa perbicaraan kelak.

[52] Reverting to the CCTV recordings, *albeit* with the inaccurate timelines, it suggests that the said incident happened at 1.54am but the entry in the station diary as seen at p. 118 of Bundle B (entry 0297) stated as follows: "Kons 208807 buat rondaan semua sel lokap dapati keadaan baik seadanya". The entry 0297 was supposedly made at 0205 hours, a few minutes after the alleged hanging incident at 1.54am. However, with the alleged discrepancies of timeline of 25 to 30 minutes, it would seem that the actual hanging occurred at about 2.20am to 2.25am. The next entry in the station diary is entry 0298 at 0255 hours, which makes a note of the deceased having been found hung.

[53] Learned counsel for the plaintiff takes issue with the sudden use of the phrase "buat rondaan" at 0205 hours as such words were never recorded in the station diary prior to the deceased's death, and therefore, he submits raises very serious questions and suspicions as to the said entry. This in fact is part of the pleaded case where the plaintiff pleads at para. 23(e)(i) of the statement of claim as follows:

> entri-entri di dalam Buku Diari Perharian Balai tersebut adalah amat mencurigakan dan/atau tidak boleh dipercayai dan/atau tidak *bona fide*.

[54] I have perused the said station diary and have noted that these words "buat rondaan" indeed do not appear anywhere else in the station diary be it prior to or after the hanging incident. Learned counsel for the plaintiff thus submits that entry 0297 was made merely to cover up the defendants' negligence and omissions by making it seem like they had conducted their "rondaan" at the material time and had not discovered anything untoward in the lockup. From the facts and the contents of the station diary, I must say that it does appear strange that the word "rondaan" only conveniently appear at the material time just prior to the hanging.

[55] It is further submitted by the plaintiff that SD2 had failed to ensure that his subordinates, namely the second to fifth defendants, have complied with the perintah tetap and conducted rounds, or "rondaan" within the lockup every hour as the word "rondaan" seen in the station diary records adduced in court (pp. 112 to 123 of Bundle B) only appears once, which is immediately prior to the deceased's supposed time of death.

[56] Based on all the above, learned counsel for the plaintiff submits that the combined actions of SD2 and his subordinates have contributed to the deceased's death as they were negligent and derelict in their duties in that had SD2 ensured that the CCTV was monitored at all times and that hourly rounds were made and recorded in the station diary as was explicitly mandated, the deceased's death would have in all likelihood been avoided.

[57] Having considered all the above, I find merits in the submission of the plaintiff on this issue. First and foremost, it is unacceptable that there were time discrepancies on the CCTV recordings without any explanation on the

same. These time discrepancies have certainly not helped the defendants' case and the court is unable to ascertain whether the "rondaan" were made properly as mandated.

[58] In addition, quite apart from the issue that the above fact of the time discrepancy was not pleaded in their statement of defence, such time discrepancies remain unexplained and no forensic evidence was led to explain this matter.

[59] Further and crucially, as seen above, it is the defendants', own evidence that they do not monitor the CCTV recordings on a 'live' basis but only refer to it for playback purposes when an incident occurs. This, to me, is a serious digression and omission and I would find and hold that such omission clearly amounts to negligence and a breach of their duty of care to the deceased.

[60] Therefore, I would conclude that by reason of such omission, there has been a failure by the sixth defendant to ensure compliance of the perintah tetap and the memo by his subordinates *ie*, second to fifth defendants.

SD3 – Corporal Jannatul Naim bin Abdul Manab (The Second Defendant)

[61] Following from the above, it is the plaintiff's case that SD3, who was the ketua pengawai lokap of Lokap IPD SPU at the material time, had breached the perintah tetap as the ketua pengawai for failing to monitor ("memantau") the CCTV at all material times ("sepanjang tempoh penugasan").

[62] In addition, it is the plaintiff's contention that SD3 had also failed to ensure that a record is made in the station diary every time a "rondaan" is made every hour as mandated by the perintah tetap. Crucially, SD3 admitted during cross-examination that recordingevery "rondaan" in the station diary is mandatory. SD3 testified during cross-examination as follows:

Hakim: Kamu cakap tak payah. So, soalan dia yang seterusnya. Sekiranya tidak diperlukan direkodkan di dalam station diary, macam manakah seseorang itu akan mengetahui sama ada pemeriksaan tersebut telah pun dibuat atau tidak.

SD3: Untuk mengetahui?

Hakim: Ha.

SD3: Sebab dia rutin harian, memang kami masuk itu tanggungjawab check sel.

Hakim: So, adakah mana-mana rekod bahawa tugas itu telah dibuat? Kalau bukan di station diary, di mana-mana tempat lain. Nota ka, buku ka, mana-mana yang dibuat "saya telah memeriksa orang tahanan di bilik kurungan dalam setiap satu jam, semua nampak okay, tidak ada hal". Ada mana-mana tak?

SD3: Tidak ada.

Hakim: Okay.

PP: Saya cadangkan keperluan memeriksa orang-orang tahanan dalam bilik kurungan setiap sejam sekali ini mandatori, perlu direkodkan dalam station diary untuk memastikan bahawa anggota betul-betul telah melaksanakan tanggungjawab tersebut.

Hakim: Setuju tak cadangan dia?

SD3: Setuju.

(See p. 105 of the notes of proceedings dated 28 November 2023).

[63] It is the plaintiff's submission that the only way to prove that the defendants had conducted their hourly rounds of the lockup is if they had recorded the same in the station diary. Unfortunately, this was not done in this case. Even SD3, who was the Ketua Pengawai Lokap at the material time, acknowledged and agreed that a record must be kept that the rounds had been done.

[64] However, SD3 later attempted to explain that the word "rondaan" would only be recorded in the station diary when accused persons are being moved in/out of the lockup (see pp. 112 and 113 of the notes of proceedings dated 28 November 2023). However, this evidence does not seem to be consistent with the evidence of the station diary *ie*, the "buat rondaan" in entry 0297 was minuted even though there was no movement of detainee at that time.

[65] Learned counsel for the plaintiff submits that by adding the word "rondaan" in entry 0297 of the station diary constitutes an afterthought and an attempt to belatedly cover up their omission in doing a proper "rondaan". In this regard, it is further submitted that the defendants have further relied on the alleged discrepancies in the time signatures of the CCTV recordings to camouflage their inactions and omissions. In my view, there are certainly many unsatisfactory aspects of the defendants' evidence in this case in respect of the "rondaan" and CCTV recordings.

[66] Further, another unsatisfactory aspect of the evidence is that it was SD3 who had recorded the said entry 0297, although he did not personally make the said "rondaan" as it was Constable Derison (the third defendant), who allegedly was the one who made the "rondaan", who then informed SD3 of the same which then led SD3 to make the said entry 0297 into the station diary. (See p. 116 of the notes of proceedings dated 28 November 2023). As such, SD3 himself had made the notation 0297, although he was not the one that made the "rondaan".

[67] The plaintiff's case is clearly hinged on the fact that the defendants have failed to comply with the regulations in place. Of vital importance and crucial in my view is that SD3 had agreed during cross-examination that had the defendants complied with all the regulations and standard operating procedures, the deceased's death could have been avoided. SD3 testified as follows:

PP: *Saya katakan kepada Koperal, kematian dalam kes ini boleh dielakkan sekiranya kita telah jalankan tugas kita seperti di dalam Akta Polis, Kaedah Polis, Perintah Tetap dan sebagainya. Kalau kita dah patuh semua regulation ini, SOP ini, kematian ini tidak akan berlaku. Setuju?*

Hakim: Faham soalan dia?

SD3: *Setuju.*

(See p. 131 of the notes of proceedings dated 28 November 2023) (emphasis added)

[68] As such, based on the facts of the case as alluded to above as well as the testimony of SD3 in relation to his duty towards the deceased, I am of the considered view that there were omissions in carrying out his duties as the ketua pengawai lokap of Lokap IPD SPU and such amounted to a breach of the duty of care to the deceased.

SD4 – Constable Derison Pingot (The Third Defendant)

[69] It is the plaintiff's case that SD4 who was the police officer on duty as a lockup sentry in the Lokap IPD SPU at the material time, had failed to comply with the perintah tetap when he failed to conduct a "rondaan" within the lockup every hour. As seen earlier, there is no notation by SD4 himself about "rondaan" save for the entry 0297 by SD3, allegedly at 0205 hours.

[70] SD4 could not proffer any explanation as to why the word "buat rondaan" does not appear anywhere else in the station diary but were only suspiciously for entry 0297. Apart from this and crucially, SD4 admitted during cross-examination that he did not monitor the CCTV at all during his shift at the material time. His evidence is as follows:

Hakim: Malam itu syif, kamu katakan CCTV ini hanya untuk playback. Dalam jangka masa 8 jam kamu syif malam itu, ada memantau tak langsung CCTV itu?

SD4: Saya tidak pantau.

(See page 150 of the Notes of Proceedings dated 28th November 2023)

[71] Based on the above testimony, I am of the considered view that had SD4 complied with the perintah tetap, memo, rules and the available standard operating procedures and, in particular, monitored the CCTV, the deceased's death could have been avoided. As such, I would conclude that SD4's actions and omissions at the material time amount to a breach of his duty of care.

[72] In amplification of the above, it was the evidence of SD6 (Dr Chandroth Navin Pankajakshan) that the hanging of the deceased would have taken at least 15 minutes or more. In this regard, having viewed the CCTV recording, it revealed that the deceased had taken time to walk to the corner of the cell in the lockup and get prepared even before climbing up the

bars to hang himself. In my view, if there was a proper "rondaan" as required or, more importantly, if the CCTV was monitored at all times, it is almost certain that the incident could have been avoided and the safety of the deceased secured. I say this because the CCTV recording reveals that the deceased had taken some time to prepare himself to climb the bars in the cell in preparation and if properly monitored, the police would have been certainly alerted and would have been able to stop him.

SD5 – Corporal Ramilah Superman (The Fifth Defendant)

[73] Moving on to the testimony of SD5, who was on duty as the pengawai lokap wanita at IPD SPU, at the material time.

[74] Again, and crucially, SD5 had similarly agreed during cross-examination that had the perintah tetap and all the defendants' duties, rules and the standard operating procedures been complied with, the deceased's death could have been avoided. SD5 testified as follows:

> PP: Very well My Lord. Koperal, saya rumuskan bahawa Perintah Tetap, SOP Polis, Memo yang dikeluarkan oleh Inspektor Daniyal masa itu, semuanya bertujuan untuk mengelakkan kematian daripada berlaku di dalam lokap. Setuju?
>
> SD5: Setuju, Yang Arif.
>
> *PP: Saya katakan, kalau anggota polis yang bertugas telah mematuhi SOP, telah mematuhi Perintah Tetap, telah mematuhi semua regulation, kematian dalam kes ini boleh dielakkan. Setuju?*
>
> *SD5: Setuju.*
>
> (See page 166 of the Notes of Proceedings dated 28th November 2023) (emphasis added)

[75] Based on the above testimony of SD5, I am of the considered view that SD5's actions and omissions amount to a breach of her duties and the duty of care. SD5's inaction, omissions as well as dereliction of duties in her role as the pengawai lokap wanita at IPD SPU at the material time had contributed to the death of the deceased. Had SD5 ensured that the CCTV was monitored at all times and that hourly rounds were made and recorded in the station diary as mandated, the deceased's death would have in all likelihood been avoided.

[76] Therefore, it is an inescapable conclusion that the failure of the first to sixth defendants to comply with the perintah tetap, memo, rules and the standard operating procedures had led to the deceased's death and/or his death could have been avoided. In my view, in conclusion, they were clearly negligent as they have failed to ensure the safety of the deceased whilst in their custody as it is clear that all these rules are put in place for the very purpose to ensure their safety and to avoid prisoners from harming themselves or committing suicide.

Defendants' Failure To Adduce Full CCTV Recording

[77] The plaintiff has also submitted on the defendants' failure to adduce the entire CCTV recordings to prove the defendants' case that they had complied with the perintah tetap and conducted hourly rounds within the lockup. The CCTV recordings that were adduced before me was merely a brief recording of the CCTV screen *via* a mobile phone, which only shows the hanging incident and not any of the "rondaan" or incidents prior to or after the said hanging.

[78] It is the plaintiff's submission that despite pleading that the CCTV recordings would be produced, they were not and the plaintiff now submits that the same had been deliberately withheld from these proceedings by the defendant and such deliberate refusal to bring these recordings to the court would attract s. 114 illustration (g) of the Evidence Act 1950 against the defendants.

[79] In this regard, the plaintiff relies on the case of *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir'* [2011] 9 CLJ 426; [2012] 4 MLRH 560, where Justice Nallini Pathmanathan (as Her Ladyship then was) held as follows:

> The elements for negligence were established by the plaintiffs. *The onus then shifted to the defendant to rebut the charge of negligence and breach of duty by showing that the cause of the anchor snagging the oil pipeline and the consequent rupture was not caused by it.*
>
> *The court was deprived of the best evidence available which was available from the master of the vessel – a witness which the defendant could have subpoenaed to give evidence but failed to do so.* There was an absence of evidence on the crucial issue of what the master did. The defendant then failed to rebut or discharge the inference of negligence established by the plaintiffs. *This was a fit and proper case for this court to draw an inference under s. 114(g) Evidence Act 1950.* (emphasis added)

[80] Applying the abovementioned case, I am of the considered view that given that the entire case revolves around the incident that took place in the lockup, this court was deprived of the best evidence available *ie*, the entire CCTV recordings, which was available from the defendants despite para. 12(f) of their statement of defence which pleaded that they would produce the CCTV recordings in court.

[81] In my opinion, the failure to adduce the entire CCTV recordings at trial, added by the fact that the short recording adduced before the court was one recorded by a mobile phone, is totally unacceptable, especially when no evidence was led to explain why the actual CCTV recordings could not be produced in full which would have been able to shed light on so many issues pertaining to the lockup. As such, I find this a fit and proper case for this

court to draw an adverse inference under s. 114(g) of the Evidence Act 1950. (See the case of *Zaidi Mohd Zain & Anor v. PP* [2021] 6 CLJ 905; [2021] 4 MLRH 33).

Disciplinary Actions Against SD3, SD4 And SD5

[82] Apart from the above, it has also been adduced in evidence that SD3, SD4 and SD5 were all subjected to administrative disciplinary action for their roles in the events leading to the death of the deceased in the lockup.

[83] SD3 confirmed during cross-examination that he had been given administrative disciplinary action for his role in the events relating to the deceased's death. SD3 testified as follows:

PP: Soalan lanjutan. Ada apa-apa tindakan tatatertib yang telah diadakan terhadap kamu berkenaan kes ini?

SD3: Ada.

Hakim: Apa tindakan terhadap kamu?

SD3: **Amaran bentuk pentadbiran.**

Hakim: Amaran tu buat apa? Apa intipati amaran yang telah diberikan? Kamu ingat? Kamu setuju kamu telah diberi amaran oleh pentadbiran, jadi apa amaran tu? Amaran tu, okay, lain kali tak boleh buat tu, apa amaran secara terperinci?

SD3: **Saya kena setahun setengah amaran.**

(See pages 130 and 131 of the Notes of Proceedings dated 28th November 2023) (emphasis added)

[84] SD4 had also admitted that he had been admonished with disciplinary action for his role in the deceased's death. (See p. 153 of the notes of proceedings dated 28 November 2023).

[85] In addition, SD5 confirmed during cross-examination that she was also admonished with disciplinary action for her role in the deceased's death. SD5 testified as follows:

PP: Di dalam kes ini, adakah apa-apa tindakan tatatertib yang telah diambil terhadap Koperal?

SD5: Ada.

PP: Tindakan tatatertib ini, apakah tindakan tatatertib yang telah diambil terhadap kamu?

SD5: Amaran dalam bentuk pentadbiran.

PP: Untuk berapa lama?

SD5: Setahun.

(See page 161 of the Notes of Proceedings dated 28th November 2023)

[86] SD5 further agreed that the fact that she had been admonished with disciplinary action by her superiors was indicative that she had been negligent in her duties. SD5 testified as follows:

Hakim: Ya tahu memang ada banyak kerja. Tapi soalan peguam bijaksana memandangkan kamu telah pun diberikan satu amaran, setuju tak maknanya kamu ini memang telah dianggap cuai lah. Kamu tidak setuju. Setuju ka tak setuju dengan cadangan dia? Dia cadangkan sebab memandangkan ada tindakan tatatertib iaitu satu amaran, maknanya kamu memang telah dianggap cuai lah. That is your question, right?

PP: Yes, My Lord.

Hakim: Setuju ka tak setuju? Kamu boleh setuju atau tak setuju, up to you, you the one answering.

SD5: Saya setuju.

(See page 162 of the Notes of Proceedings dated 28th November 2023)

[87] In my view, it is clear that the perintah tetap itself in its note states that a presumption of negligence arises whenever there is a case of suicide. The fact that the three defendants were meted disciplinary actions over the suicide incident of the deceased clearly indicates that they did not rebut that presumption and were punished. Whilst this court's conclusion that they were negligent is based on the facts adduced in this case and not based on such disciplinary actions, the fact that they were meted punishments is further indicative that they were negligent in carrying out their statutory duties.

SD6 Dr Chandroth Navin Pankajakshan

[88] SD6 (Dr Chandroth Navin Pankajakshan) is a forensics expert who had conducted the post-mortem examination on the deceased on 22 November 2019. SD6 testified that he had also conducted a site visit to the scene where the deceased passed away. A post-mortem report was also prepared as seen at pp. 12 to 16 of Bundle B wherein SD6 had certified the deceased's death as "consistent with hanging". This was the same conclusion at the Coroner's inquest.

[89] As indicated earlier, there is no dispute that the cause of death was in fact hanging and there is no allegation that anybody apart from the deceased participated in the deceased's hanging. In fact, a perusal of the CCTV recordings will leave no doubt that the incident was at the sole hands of the deceased.

[90] Further, during cross-examination, SD6 testified that the entire process of hanging to eventual death would take slightly longer than 15 minutes. SD6 testified as follows:

PP: So, in this case, dalam kes ini, the higher bone was not broken?

SD6: Not fractured.

PP: So, it must have probability in more than 15 minit, I guess. From the initial hanging to the stopping of the muscle or the twitching of the muscle as you said.

SD6: Ya, probably slightly if there was sufficient support if the deceased was leaning enough against the bars, probably the some of the weight might get transfers to the bars roughly about 15 minutes give or takes few minutes but not too long, not to say few hours to say like that.

(See page 182 of the Notes of Proceedings dated 22nd January 2023).

[91] Learned counsel for the plaintiff submits that based on the doctor's testimony, 15 minutes is a long time, bearing in mind that this incident happened within a police lockup, which is technically supposed to be monitored 24/7 with the aid of CCTV monitoring and in the circumstances, had the defendants been diligent in their duties as mandated, the deceased's death could have been averted. I agree.

[92] To this end, reference was made to the recent case of *Qi Qiaoxian (Claiming As The Mother And Dependent Of Qi Xiangqing, Deceased) & Anor v. Sunway Putra Hotel Sdn Bhd* [2024] 5 CLJ 734; [2024] 4 MLRA 49, where Wong Khian Keong JCA held as follows:

[41] Notwithstanding the three reasons given by the learned Sessions Court and High Court Judges in the above para 41, there was an "unwarranted deduction based on faulty judicial reasoning from admitted and established facts" by the Sessions Court and the High Court. This is due to the following evidence and reasons:

(1) the deepest part of the Pool was 3 metres (Three-Metre Deep Pool);

(2) the Defendant operates a "5 Star" Hotel and the Deceased had paid for the Defendant's services in a "5 Star" Hotel; and

(3) in view of the Three-Metre Deep Pool, any reasonable operator of a "5 Star" Hotel should have ensured that:

(a) a certified life guard should be on duty at the Pool when the Pool was open to the Hotel's guests (including the Deceased); and;

(b) *at the time of the Incident an employee of the Defendant should be monitoring the "Closed Circuit Television" (CCTV) which had already been installed at the Pool. If otherwise, why would the Defendant install the CCTV in the first place.*

(emphasis added)

[93] Although the above case concerns occupier's liability, the Court of Appeal's sentiments regarding monitoring of CCTV systems are applicable here and applying the same to the facts in the present case, had the CCTV been monitored at all times and bearing in mind that the deceased's death clearly took more than 15 minutes, the deceased's death could have been avoided.

[94] I therefore find favour in the submissions of the plaintiff bearing in mind that the said incident did not occur in an instant, I too am of the view that had there been proper patrolling or monitoring of the CCTV of the lockup, the deceased's death could have been avoided as admitted by some of the defendants' witnesses themselves as highlighted earlier.

[95] In the upshot, having considered the facts and the evidence before me in its totality, I am of the considered view that the plaintiff has succeeded in proving that the defendants, especially the first to sixth defendants have breached their duty of care towards the deceased when they, amongst others failed to send the deceased for medical examination pursuant to r. 10 of the Lockup Rules 1953, failed to ensure constant monitoring of the CCTV as well as the "rondaan" in accordance with the perintah tetap and the memo. Such omissions, in my view, amount to negligence as there have been a failure to ensure the safety of the detainee whilst in custody and there has been a failure to prevent the suicide.

Crux Of The Defendants' Defence

[96] Having considered the facts as well as the testimony of each defendants' witnesses as highlighted above, I now turn to consider the crux of the defendants' defence. In this regard, whilst the defendants concede that they owe a duty of care to detainees, such they say is only a general duty of care and that they have not been negligent on the facts of this case.

[97] The defendants' main contention is that the deceased hung himself on his own will and not due to the defendants' negligence as alleged by the plaintiff. In this respect, the defendants rely on the case of *Orange v. Chief Constable Of West Yorkshire Police* [2001] EWCA Civ 611, where the Court of Appeal held as follows:

> ... that the scope of the duty of the police to take reasonable care for the health and safety of a person in their custody had to be considered in the context of an increased risk of suicide amongst those in custody as against those in the community, with those on remand or convicted prisoners at significantly increased risk; that suicide was not forseeable risk in relation to every prisoner; that the increased risk of suicide amongst prisoners gave rise to an obligation, within the custodian's general duty of care for the prisoners's health and safety, *to take reasonable steps to identify whether or not a prisoner presented a suicide risk;* that the obligation to take reasonable care to prevent a prisoner from taking his own life deliberately only arose

A where the custodian knew or ought to have known that the individual prisoner presented a suicide risk; *that since the police officers had taken reasonable steps to asses whether or not the deceased was a suicide risk and had been justified in concluding that he was not,* the police had not been negligent in permitting the deceased to retain his belt and the chief constable did not owe him a duty of care to prevent him from taking his life deliberately;
B ...

... Further, there is no evidence which suggests that those arrested for being drunk and disorderly form a category of prisoner in respect of which there is any significantly increased risk of suicide. More particularly, there is no material before us which suggests that there had been any previous
C incidents of suicide or self harm in the Bridewell of any relevance to this particular case. (emphasis added)

[98] The above *dicta* in the case of *Orange* (*supra*) have been followed by several local cases such as *Kunasekaran Renggaga v. ASP Heisham Harun, Ketua Balai Polis Bukit Sentosa & Ors* [2012] 4 CLJ 237 and *Sushila Rani*
D *Ramasamy lwn. Kerajaan Malaysia & Yang Lain* [2023] CLJU 1358; [2023] 1 LNS 1358.

[99] In the case of *Kunasekaran Renggaga* (*supra*), Hadhariah Syed Ismail JC (as Her Ladyship then was) held as follows:

E [28] Reverting to the facts of the present case, there were ample evidence before the court that the deceased is not a suicide risk. This is an undisputed fact. Thus, following the principles of law laid down in *Orange v. Chief Constable of West Yorkshire* [2002] QB 347, I hold that the police did not owe a duty of care to ensure the deceased would not commit suicide. The duty of care does not arise
F as the deceased is not a suicide risk. I further hold, although the police have failed to comply with Perintah Tetap Ketua Polis Daerah Hulu Selangor, that fact alone is not sufficient to make the defendants liable. The negligence act of the police may be a cause for disciplinary action to be taken by the police department against their officers. But as far as this court is concerned, I had no doubt
G whatsoever that the deceased had committed suicide by hanging. I had to reject the plaintiff's contention that there was a cover up or foul play by the police. On those grounds, I hold the plaintiff have failed to prove his case against the defendants.

[100] Further, in the case of *Sushila Rani Ramasamy* (*supra*), Shamsulbahri
H Haji Ibrahim J held as follows:

[19] Setelah meneliti secara keseluruhan keterangan SD6, tiada sebab untuk saya tidak mempercayai keterangan daripada SD6 yang merupakan Pakar Perunding Perubatan Forensik dan Ketua Jabatan Forensik Hospital Sultan Ismail sejak 2010. Beliau juga merupakan
I pengajar bidang forensik di institusi pengajian tinggi awam dan swasta serta pensyarah kehormat di University of Newcastle. Biodata ini menunjukkan SD6 mempunyai kepakaran dan

pengalaman yang luas dalam bidang ini. Keterangan yang diberikannya secara saintifik dan terperinci meyakinkan mahkamah bahawa simati telah menggantung dirinya sendiri. Persoalan yang dibangkitkan oleh peguam Plaintif mengenai mengapa simati sanggup berbuat demikian sedangkan beliau masih muda dan hanya beberapa tahun lagi untuk dibebaskan, hanya tuhan dan simati sahaja yang tahu jawapannya.

[20] Mengenai dakwaan pelanggaran kewajipan berjaga-jaga yang dilakukan oleh Defendan-defendan, Plaintif berhujah bahawa fakta simati meninggal dunia di dalam penjara adalah bukti bahawa Defendan-defendan telah gagal menjalankan kewajipan berjaga-jaga mereka. Plaintif telah merujuk kepada dua kes iaitu *Janagi Nadarajah & Anor v. Sin Razali Budin & Ors* [2021] 10 CLJ 915 dan *Rahaya Salleh v. Nik Mohd Ghazali Nik Zul Azhar & Ors and Another Appeal* [2022] 8 CLJ 591; [2022] 1 LNS 1087.

[21] Pada pandangan saya, fakta bahawa simati meninggal dunia dalam penjara semata-mata tidak boleh dijadikan sandaran bahawa Defendan-defendan telah gagal melaksanakan kewajipan berjaga-jaga mereka. Kedua-dua kes yang dirujuk oleh Plaintif tidak boleh dijadikan asas bagi menjadikan liabiliti terhadap Defendan-defendan tanpa sokongan bukti dan keterangan kukuh yang lain. Ini kerana fakta kedua-dua kes tersebut amat berbeza dengan kes di hadapan saya.

[22] Dalam kes *Janagi Nadarajah* (*supra*), simati telah meninggal dunia di Lokap Berpusat Jinjang. Simati diketahui mempunyai sejarah kesihatan sebagai pesakit darah tinggi, angin ahmar, diabetis dan masalah jantung yang memerlukan beliau mengambil sebanyak sepuluh jenis ubat bagi penyakit tersebut setiap hari. Simati telah ditemui mati dalam selnya dan dibawa ke hospital dalam keadaan tidak bernyawa. Mahkamah mendapati pihak penjara bertanggungan terhadap simati kerana beliau telah dinafikan haknya untuk mendapatkan bekalan ubat sewajarnya di dalam penjara.

[23] Bagi kes *Rahaya Salleh* (*supra*) pula, simati telah dipenjarakan di Penjara Tapah bersama 30 orang banduan lain dalam satu sel. Simati telah mengadu mengalami cirit birit dan didapati terbaring dalam selnya. Simati telah dibawa ke Hospital Tapah dan didapati telah meninggal dunia. Post mortem yang dijalankan ke atas simati mendapati punca kematian adalah jangkitan kuman pada paru-paru. Mahkamah mendapati pihak penjara bertanggungan atas kematian simati kerana gagaI membuat pemeriksaan kesihatan terhadap simati semasa dia mula-mula dimasukkan ke penjara. Ini disebabkan jangkitan pada paru-paru tidak akan terjadi secara tiba-tiba.

[24] Dalam kes di hadapan saya, simati meninggal dunia bukan disebabkan masalah kesihatan. Sebaliknya kematiannya disahkan oleh SD6 sebagai menggantungkan diri sendiri. Oleh itu kewajipan berjaga-jaga dalam kes seumpama ini adalah jauh berbeza dengan keadaan dalam kes-kes yang dirujuk sebelum ini.

A [25] Bagi kes yang melibatkan bunuh diri di dalam penjara, ujian kebolehjangkaan (foreseeable test) banduan membunuh diri perlulah dibuat bagi menentukan sama ada pihak penjara gagal melaksanakan kewajipan mereka atau sebaliknya. Ini bermakna mahkamah perlu menilai bahawa Defendan-defendan secara munasabah boleh menjangkakan tindakan membunuh diri oleh
B simati. Dalam kes *Orange v. Chief Constable of West Yorkshire* [2002] QB 347 di mana Lord Justice Latham menyatakan:

> 42. The consequence of Mr Owen's argument is that every person taken into custody, whether police custody or the custody of the Prison Service, is to be treated as a suicide risk. We do not
C consider that that is the appropriate response of the court to the material before us. *There is no doubt that a custodian owes a duty of care to those taken into custody. As we have said, the duty is to take reasonable care for that person's health and safety.* In determining the extent of that duty, it is clearly relevant to take into account the fact that there is an increased risk of suicide amongst such
D prisoners. But that does not mean that suicide is a foreseeable risk in relation to every prisoner. As Lord Hope said in *Reeves* (*supra*) at page 378, suicide can be both unforeseen and unforeseeable. *Nor do we consider that it would be fair; just and reasonable to impose upon either the police or the Prison Authorities a general obligation to treat every prisoner as if he or she were a suicide risk.*
E The consequence would be an unacceptable level of control and precaution, not only as an obligation placed upon the authorities, but also as an imposition on the individual prisoner.
>
> 43. It seems to us that the right balance is struck by recognising, as Lord Hoffmann did in *Reeves* (*supra*) at p. 368, in the passage we
F have already cited, that "a duty to protect a person of full understanding from causing harm to himself is very rare indeed". Lord Hope said much the same at page 379H, again in a passage which we have already cited. *In my judgment, the increased risk of suicide amongst prisoners can properly be said to give rise to an obligation, within the general duty of care the custodian has*
G *for the prisoner's health and safety, to take reasonable steps to identify whether or not a prisoner presents a suicide risk. The obligation to take reasonable care to prevent a prisoner from taking his own life deliberately only arises where the custodian knows or ought to know that the individual prisoner presents a suicide risk.* In our view Lord
H Hoffmann and Lord Hope when adverting to the general risk of suicide in prison and the relationship between the custodian and the prison were doing so in order to explain why the very unusual duty arose at all. We do not consider that Lord Hoffmann intended the duty to apply to all prisoners. Lord Hope, in our view, clearly intended that the duty should only
I be owed where the risk of suicide in the individual case justified imposing it.

[26] Berdasarkan kepada kes *Orange* (*supra*) di atas, pihak penjara tidak boleh dipertanggungkan secara otomatik bagi setiap kejadian bunuh diri yang berlaku di dalam penjara. Adalah silap sekiranya menganggap setiap banduan mempunyai risiko membunuh diri. Sebaliknya tindakan membunuh diri di penjara bukanlah suatu risiko yang boleh dijangkakan untuk kesemua banduan. Tanggungjawab berhati-hati hanya berbangkit apabila banduan telah diketahui atau dipercayai secara munasabah mempunyai risiko untuk membunuh diri. Oleh itu, kewajipan berhati-hati tidak berbangkit apabila perbuatan membunuh diri tidak dijangka (unforeseen) dan tidak boleh dijangka (unforeseeable).

[27] Dalam kes *Kunasekaran Renggaga v. ASP Heisham Harun, Ketua Balai Polis Bukit Sentosa & Ors* [2012] 4 CLJ 237; [2011] 1 LNS 884 Hakim Hadhariah Syed Ismail PK (sekarang HMR) telah menekankan tentang keperluan pembuktian kewujudan risiko bunuh diri dalam menentukan liabiliti di mana beliau memutuskan:

> [28] Reverting to the facts of the present case, *there were ample evidence before the court that the deceased is not a suicide risk.* This is an undisputed fact. Thus, following the principles of law laid down in *Orange v. Chief Constable of West Yorkshire* [2002] QB 347, *I hold that the police did not owe a duty of care to ensure the deceased would not commit suicide. The duty of care does not arise as the deceased is not a suicide risk.* I further hold, although the police have failed to comply with Perintah Tetap Ketua Polis Daerah Hulu Selangor, that fact alone is not sufficient to make the defendants liable. The negligence act of the police may be a cause for disciplinary action to be taken by the police department against their officers. But as far as this court is concerned, I had no doubt whatsoever that the deceased had committed suicide by hanging. I had to reject the plaintiff's contention that there was a cover up or foul play by the police. On those grounds, I hold the plaintiff have failed to prove his case against the defendants.

[28] Dalam kes di hadapan saya, semua saksi yang memberi keterangan di mahkamah termasuk Plaintif mengakui bahawa sebelum kejadian tersebut berlaku tiada tanda-tanda yang menunjukkan simati akan mengambil nyawanya sendiri. Selain itu, sepanjang simati berada di Penjara Kluang lebih kurang 2 tahun, tiada keterangan yang menyatakan bahawa simati pernah cuba mencederakan diri atau cuba membunuh diri. Simati juga tidak mengalami masalah mental atau mengalami penyakit kronik. (emphasis added)

[101] However, in my view, each case is, to a large extent, dependent on its own facts (facts sensitive) and ought to be decided on a case-to-case basis. In my opinion, the facts in *Orange* (*supra*), *Kunasekaran* (*supra*) as well as *Sushila Rani Ramasamy* (*supra*) are different from the present facts in several respects.

[102] It is to be noted that *Orange* (*supra*) is a case decided in the United Kingdom in 2001, where the police were held to have not breached their duty when the deceased hung himself in the police lockup cell bar using his

own belt. The Court of Appeal in that case held that despite the deceased's inebriated state, the deceased did not present an "increased risk" of suicide and as such, did not impose a duty upon the police.

[103] I have referred to the case of *Reeves* (*supra*) by the House of Lords earlier and I must say that I cannot conclude that the UK Court of Appeal intended *Orange* (*supra*) to be the definitive approach when dealing with suicides in police lockups. Based upon my reading of *Orange* (*supra*), the Court of Appeal's primary concern there was whether a drunk and disorderly person "formed a category of prisoner in respect of which there is any significantly increased risk of suicide". The trial court in *Orange* (*supra*) was presented with scientific evidence in the form of expert opinion and the Court of Appeal ultimately decided in the negative based on the facts of that case.

[104] It is also pertinent to note that in *Orange* (*supra*), the High Court adjudged the police officers, who had care and custody of the deceased, to have complied with their duties and had actively monitored the deceased where it held as follows:

> The judge cited a substantial passage of evidence given at the Inquest by Chief Superintendent Halligan who had been appointed to investigate the death of Mr Orange on behalf of the Police Complaints Authority. In that passage, he dealt with the extent of the supervision that had been exercised by the officers that morning. He took the view that the extent of supervision, particularly because of the presence of the CCTV, was exceptional. His view clearly was that in the absence of any cause for concern in relation to Mr Orange's safety or well being, no criticism could be made of the police officers responsible for Mr Orange's custody. It is implicit in the judge's judgment that she accepted Mr Halligan's evidence in this respect.

[105] Further, in the case of *Orange* (*supra*), there was an active assessment of the deceased's mental and physical state by the police officers who had custody of the deceased. The officers in that case had assessed the deceased and deemed him to not be at risk of harming himself, thereby allowing him to keep his belt, which would prove fatal not long after.

[106] Another distinguishing factor is that there are no "Lockup Rules 1953" or "Perintah Tetap" referred to in the case of *Orange* (*supra*) as in this case. The officers on duty in *Orange* (*supra*) had not been under a statutory duty to refer a new detainee to a medical examination. In this present case, the defendants acknowledged the existence of r. 10 of the Lockup Rules 1953 and its mandatory nature. The defendants in this case also admitted that this was not complied with.

[107] The defendants further rely on the case of *Kunasekaran* (*supra*), which also concerned a detainee hanging himself in a police lockup. In dismissing the plaintiff's claim for negligence there, Hadhariah Syed Ismail JC (as Her

Ladyship then was) had relied on the case of *Orange* (*supra*) above and held that since the deceased was not considered a "suicide risk", the police did not owe a duty of care to ensure the deceased would not commit suicide. A

[108] However, I note that the plaintiff's claim was dismissed for the failure to name the actual tortfeasors in their statement of claim, which proved fatal pursuant to the Government Proceedings Act 1956. There was no appeal against such decision. B

[109] The defendants further rely on *Sushila Rani Ramasamy* (*supra*) which was another hanging case in prison where the court in that case held that prison authorities "tidak boleh dipertanggungkan secara otomatik bagi setiap kejadian bunuh diri yang berlaku di dalam penjara." However, in my view, the facts in the case of *Sushila Rani Ramasamy* (*supra*) are significantly different from this present. C

[110] Firstly, the deceased in that case had been in the Kluang Prison for about two years. Secondly, a prison environment is, in my view, different to a police lockup environment. A prison is many times more crowded than a police lockup and it can understandably be very difficult to monitor each and every prison inmate at all material times. In this case, however, the cells of the lockup are equipped with CCTV. The police officers are mandated to conduct hourly rounds around the lockup. The size of the lockup would also mean that police officers on duty can canvas the entirety of the holding areas quickly with relative ease, which is a "luxury" a prison complex does not have. D E

[111] The decision of the High Court to dismiss the plaintiff's claim in *Sushila Rani Ramasamy* (*supra*) is currently pending appeal in the Court of Appeal. F

[112] As for me, having considered the various decided cases as referred to above, I am more inclined to adopt the lucid judgment of Abdul Wahab JC (as His Lordship then was) in *Lim Gaik Suan & Anor v. Mohamad Norhafiz Md Haron & Ors* [2017] MLRHU 1926 where the facts are similar to the one at hand. In *Lim Gaik Suan* (*supra*), His Lordship, in the course of allowing the plaintiff's claim, held as follows: G

> When then can a risk of suicide be said to be foreseeable? Must the deceased possess a history of suicide attempts before he can be said to have suicide risk? Whether or not risk of suicide is foreseeable depends on the facts and circumstances of each case. It would, in my opinion, be absurd to expect the deceased to inform the police of his intention to commit suicide or even attempts made on occasions. The absence of such evidence does not in my view make unforeseeable risk incases of persons in custody. H I

A Contrary to the case of *Kunasekaran Renggaga v. ASP Heisham Harun, Ketua Balai Polis Sentosa & Ors* [2012] 6 MLRH 545; [2012] 4 CLJ 237 referred to by the Defendent where the deceased in the said case had never attempted suicide despite having been arrested by the police on several occasions, there was however no evidence in the present case to show that the Deceased had history of being arrested and/or detained by the
B police.

I do not think it proper for the Defendants to claim that there was no suicide risk on the part of the Deceased where there were no previous attempts of suicide made. There was no evidence adduced to show that the Deceased had any previous conviction and/or past history of criminal
C activity which had resulted in the arrest and/or detention of the Deceased by the police. In the present case, there could be no proof of previous attempt of suicide as the Deceased had succeded even on his first attempt of suicide under police custody.

It has long been recognised in the case of *Reeves* cited above that person
D placed in a lock-up cell was almost certainly being subjected to abnormal stresses which he would be liable to cause him to act irrational fashion and do things which he would not normally contemplate; he may suffer impulses which he would not normally suffer.

[113] It has been brought to my attention by both learned counsel herein that
E although the Government appealed to the Court of Appeal against the decision above, parties thereafter entered into a consent judgment whereby the various sums awarded as general damages based on the finding of negligence were maintained and paid save for an amount of RM20,000 for exemplary damages that was agreed to be deducted.

F **[114]** Still on the issue of the common law duty of care, the case of *Robinson v. Chief Constable Of West Yorkshire Police* [2018] UKSC 4 is also instructive. In that case, the Supreme Court clarified the modern position of the common law duty of care since *Caparo Industries Plc v. Dickman* [1990] 1 All ER 568. Essentially, it was held as follows:

G 24. In *Caparo*, Lord Bridge of Harwich noted that, since Anns, a series of decisions of the Privy Council and the House of Lords, notably in the judgments and speeches delivered by Lord Keith of Kinkel (including his speech in *Hill v. Chief Constable of West Yorkshire*), had emphasised "*the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a*
H *duty of care is owed and, if so, what is its scope.*"

...

[45] For the purposes of the present case, the most important aspect of Lord Keith's speech in *Hill* is that, in the words of Lord Toulson (Michael, para 37), "he recognised that the
I general law of tort applies as much to the police as to anyone else". What Lord Keith said was this: *"There is no question that a police officer, like anyone else, may be liable in tort to a person who*

is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence." (p 59; emphasis supplied)

The words *"like anyone else" are important.* They indicate that the police are *subject to liability for causing personal injury in accordance with the general law of tort.* That is as one would expect, given the general position of public authorities as explained in paras 32-33 above.

...

[48] These cases are not anomalous exceptions to the general absence of a duty of care, and cannot all be explained as falling within particular categories of the kind listed by Hallett LJ in the present case: *cases of outrageous negligence,* cases which did not relate to core functions, and cases where police officers *had assumed responsibility for a claimant.* The cases of *Rigby v. Chief Constable of Northamptonshire* and *Marshall v. Osmond*, for example, are *plainly inconsistent with any supposed rule that the police owe no duty of care* when engaged in their core operational activities, or that *"outrageous negligence"* or an assumption of responsibility must be established. On the contrary, these cases are examples of the application to the police of the ordinary common law duty of care to avoid causing reasonably foreseeable injury to persons and reasonably foreseeable damage to property.

[70] Returning, then, to the second of the issues identified in para 20 above, it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. *They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise.* Applying those principles, *they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency,* as in *Dorset Yacht* and *Attorney General of the British Virgin Islands v. Hartwell*. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury Page 26 which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility. (emphasis added)

[115] As such, having considered the facts and circumstances of the present case as highlighted above, I find that the defendants did indeed owe a duty of care to the deceased to protect him from danger or self-injury and that the plaintiff has succeeded on proving on a balance of probabilities that their omissions in not complying with the rules and regulations in place had failed to prevent the deceased's suicide.

Issue No. 4: Whether The Seventh Defendant Had Failed To Investigate The Death Of The Deceased In A Transparent And Honest Manner?

SD7 – ASP Winston anak Raip (D7)

[116] It is to be noted that SD7 was the officer assigned to investigate the deceased's death. It is the plaintiff's contention that SD7 had failed and/or neglected and/or omitted to conduct a thorough and transparent investigation into the deceased's death.

[117] The plaintiff submits that given that the first to sixth defendants are all colleagues of SD7, this raises red flags towards the impartiality of SD7 in that his independence and objectivity towards his investigation into his colleagues with regards to the deceased's death would be called into serious question.

[118] In this regard, the plaintiff relies on the case of *Ganga Gowri Raja Sundram lwn. PP* [2012] 7 CLJ 180; [2012] MLRHU 1662, where it was held as follows:

> [29] Akhirnya, saya ingin membuat pemerhatian bahawa seorang pegawai penyiasat bagi kes-kes kematian semasa dalam tahanan pihak polis, adalah wajar pegawai penyiasat daripada balai polis atau IPD yang lain menjalankan siasatan. Lebih-lebih lagi sekiranya dalam kes kematian tersebut terdapat tohmahan bahawa pegawai atau anggota balai polis yang sama dikatakan terlibat dengan kematian simati tersebut. Ini adalah supaya siasatan tersebut dilihat lebih transperen, berintegriti serta meyakinkan semua pihak terutama ahli keluarga kepada simati.

[119] The plaintiff thus submits that investigations should be conducted in an impartial and transparent manner that instils public confidence.

[120] SD7 had candidly conceded during cross-examination that he did not investigate the circumstances of the deceased's arrest prior to his detention in the lockup of IPD SPU, which meant that SD7 did not possess the necessary knowledge as to the deceased's condition prior to his detention. SD7 also failed to investigate whether the deceased had been mistreated and/or informed of his lawful rights during his arrest, which would have affected his mental state at the material time. SD7 had testified as follows:

> PP: Okay. Alright. Bermaksud ASP untuk penjelasan, bermaksud ASP tidak tahu latar belakang penangkapan, berapa ataupun apakah pertuduhan yang dihadapi oleh si mati dan sebagainya, ASP tidak ada pengetahuan langsung.
>
> SD7: Sebelum tidak tapi serba sedikit saja kerana saya perlu serba sedikit tahu sahaja.
>
> (See page 188 of the Notes of Proceedings dated 23rd January 2024)

[121] It also appears that SD7 failed to ascertain if r. 10 of the Lockup Rules 1953 had been complied with in this case. Rule 10 of the Lockup Rules 1953 provides that each detainee must be examined by a medical officer as soon as possible and it was thus submitted by the plaintiff that this failure/omission by SD7 demonstrates a clear lack of interest and initiative on the part of SD7 to conduct a thorough investigation into the deceased's death. (See p. 189 of the notes of proceedings dated 23 January 2024).

[122] The plaintiff also points out that SD7 had also failed to investigate whether SD3, SD4, SD5 and the fourth defendant had conducted their hourly "rondaan" of the lockup as mandated by the "Perintah Tetap". SD7 maintains that based on his "bacaan dan semakan saya dalam SD yang telah dikemukakan oleh KPB Inspektor Muhammad Adam, saya dapati ada." The plaintiff submits that SD7's evidence in this regard is entirely unacceptable as the only time the word "rondaan" ever appeared in the station diary is at entry 0297 immediately prior to the deceased's time of death. In my view, the fact that SD7 had accepted the other defendants' evidence with regards to the hourly rounds having been made without any corroborative evidence perhaps supports, to some extent, the plaintiff's complaint about the incomplete/improper investigation by SD7 of the deceased's death.

[123] However, it is to be noted at this juncture that the main crux of the plaintiff's claim is the alleged negligence of the defendants, which they claim led to the death of the deceased at the lockup. As such, even assuming that there were some shortcomings in the investigations by SD7, I find there to be no nexus of the same with the death of the deceased, as these investigations were only undertaken after the incident.

[124] As such, I am of the considered view that there is nothing to link or that there exists any causation between the alleged manner and conduct of SD7's investigation to the death of the deceased in the lockup.

Issue No. 5: Whether The Eighth, Ninth And Tenth Defendants Have Failed To Control And/Or Supervise The Other Defendants In Carrying Out Their Duties And Obligations?

Eighth To Tenth Defendants

[125] It is to be noted at para. 28 of the statement of claim, the plaintiff pleads that the actions and conduct of the seventh defendant fall under the control of the eighth to tenth defendants.

[126] The plaintiff submits that the first to seventh defendants had been negligent in this case, and therefore, it follows that the eighth to tenth defendants had failed to control and/or supervise the other defendants in carrying out their duties and obligations. The eighth defendant, in particular was responsible for the issuance of the perintah tetap dated 4 December 2017, which is mandatory to be followed by the first to seventh defendants.

It is submitted that merely issuing such an order is insufficient. It is contended by the plaintiff that the eighth defendant had also failed to ensure the strict compliance of the said perintah tetap thereby leading to the death of one of the detainees in the IPD SPU.

[127] Learned SFC on the other hand contends that there was no evidence adduced by the plaintiff to show that the eighth to tenth defendants had in fact failed to control and/or supervise the other defendants in carrying out their duties and obligations. I agree and find favour in the defendants' submission. I find that the plaintiff has failed to adduce sufficient evidence to show the causal link between the alleged negligence of the first to sixth defendants to the eighth to tenth defendants.

[128] Learned counsel for the plaintiff has urged the court to find the eighth to tenth defendants liable on the basis that they displayed an absolutely lackadaisical attitude by failing to be present in court during these proceedings or to testify. In my view, I am not prepared to find the eighth to tenth defendants liable merely on account of non-appearing in court and I am not persuaded by the submission of learned counsel that they should be made so liable so as to send a message. The High Court in the case of *Janagi* (*supra*) has also held as follows:

> [67] I do not think making an adverse inference against these other Defendants is warranted purely because of their absence from court. The operative word in s. 114(g) of the Evidence Act 1950 is "withhold". There must be evidence of withholding or suppression of material evidence. (See *DNC Asiatic Holdings Sdn Bhd & Ors v. Honda Giken Kogyo Kabushiki Kaisha & Other Appeals* [2020] 3 MLR A 241; [2020] 1 CLJ 799 at 821). Here, there is no evidence of any withholding or suppression of material evidence simply because those other Defendants did not testify. In these circumstances, I do not think drawing an adverse inference against the Defendants pursuant to s. 114(g) of the Evidence Act 1950 is justified.
>
> [68] **Whether or not the Defendants give evidence, the burden of proof lies on the Plaintiffs.** (See ss. 101, 12 and 103 of the Evidence Act 1950). In *Wong Thin Yit v. Mohamed Ali* [1971] 1 MLRA 483; [1971] 2 MLJ 175, the Federal Court said:
>
> > In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. "Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.

> [69] It is my finding that the Plaintiffs have successfully discharged their duty to prove their case. This is in light of the evidence produced by the Plaintiffs in the Bundle of Documents as well as the oral evidence led in court. On a balance of probabilities, the Plaintiffs have proven that the Defendants had been negligent and derelict in their duties, which had caused the Deceased's death.
>
> (emphasis added)

[129] I therefore find no liability on the part of the eighth to tenth defendants.

Issue No. 6: Whether The Defendants As Public Officers Had Committed Misfeasance In Public Office At The Material Time?

[130] The plaintiff also pleaded that the defendants being in breach of their statutory duties have committed misfeasance in public office at the material time. In determining whether the plaintiff has successfully proven this cause of action against the defendants, it is best that I consider first what the tort of misfeasance entails.

[131] It is trite that an action lies for misfeasance in public office in favour of a person who, as a matter of causation, has suffered foreseeable damage as a result of an unlawful act committed by a holder of public office in the exercise of power as a public officer where the act was committed either: (1) in bad faith; or (2) with knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or persons of a class of which the plaintiff is a member.

[132] Misfeasance in public office is a tort remedy for harm caused by acts or omissions that amounted to:

(i) an abuse of public power or authority;

(ii) by a public officer;

(iii) who either:

  (a) knew that he or she was abusing their public power or authority, or

  (b) was recklessly indifferent as to the limits to or restraints upon their public power or authority;

(iv) and who acted or omitted to act:

  (a) with either the intention of harming the claimant (so-called 'targeted malice'), or

  (b) with the knowledge of the probability of harming the claimant, or

  (c) with a conscious and reckless indifference to the probability of harming the claimant.

[133] The plaintiff sought to rely on the cases of *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585; [2017] 6 MLRA 635 and *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 6 MLRA 432 to support her contention that she has proven misfeasance in public office committed by the defendants in this present case.

[134] Learned counsel for the plaintiff submits that the defendants in this case had misused their public office. The plaintiff further submits that the defendants had not only been negligent but had abused their powers by deliberately disregarding their clearly set out duties under the perintah tetap.

[135] In addition, it is also contended that the defendants had acted in total disregard of their duties and had abused their powers by being lackadaisical and nonchalant in the execution of their duties with no regard and/or had been recklessly indifferent that their actions and/or inaction and/or omissions would cause harm to the deceased.

[136] However, I am of the considered view that whilst I find that the plaintiff has successfully proven that the first to sixth defendants have been negligent in their statutory duties by failing to ensure the safety of the deceased, I cannot conclude that misfeasance has been proven.

[137] To this end, I would refer to the case of *Nurasmira Maulat Jaffar* (*supra*), where the Federal Court provided an explanation on the tort of misfeasance as follows:

> [126] The tort for misfeasance in public office is explained in the case of *Three Rivers District Council and others v. Governor and Company of the Bank of England* [2003] 2 AC 1; [2000] 3 All ER I; [20001 2 WLR 1220. According to the House of Lords, *the tort can arise under either or both of these circumstances: (1) where a public officer exercises his power in bad faith with the specific intention to injure the claimant: or (2) he exercises his power with reckless indifference about the consequences of such exercise.* Lord Steyn in that case said:
>
> > The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, *ie* conduct specifically *intended to injure a person or persons.* This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act *will probably injure the plaintiff.* It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.
>
> [127] What is also clear from the *Three Rivers* case is that misfeasance in public office is not the same as non-feasance in public office. Lord Millet explained:

> ... It is no accident that the tort is misfeasance in public office, not non-feasance in public office. The failure to exercise a power is not in itself wrongful. It cannot be equated with acting in excess of power. The tort is concerned with preventing public officials from acting beyond their powers to the injury of the citizen, not with compelling them to exercise the powers they do have, particularly where they have a discretion whether to exercise them or not.
>
> ...
>
> In conformity with the character of the tort, the failure to act must be deliberate, not negligent or arising from a misunderstanding of the legal position. In my opinion, a failure to act can amount to misfeasance in public office only where (i) the circumstances are such that the discretion whether to act can only be exercised in one way so that there is effectively a duty to act; (ii) the official appreciates this but nevertheless makes a conscious decision not to act and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury would be the natural and probable consequence of his failure to act.
>
> [128] There must be a nexus between the intentional or reckless act and the injury suffered by the person affected by the act, such that the injury is a consequence of the intentional or reckless act.
>
> (emphasis added)

[138] Based on the abovementioned case, it is my considered view that the plaintiff has failed to prove that the defendants have exercised their powers in bad faith with the specific intention to injure the deceased nor did they exercise their powers with reckless indifference about the consequences of such exercise.

[139] I have concluded earlier that the defendants have failed to comply with the perintah tetap, memo and well as the relevant standard operating procedures and such non-compliance has led to the unfortunate death of the deceased and amounts to a negligence. However, I cannot conclude that the plaintiff has proven that their failure to act was deliberate with the intention of harming the deceased.

[140] Further, I would also refer to the case of *Janagi* (*supra*) involving the death of the deceased detainee arising from the alleged failure of the police officers in providing the necessary medical attention to the deceased. In this case, the High Court, in dismissing the claim for misfeasance in public office, held as follows:

> [103] The plaintiffs argue that the defendants had committed misfeasance in public office and claim RM100,000 as damages for such. I reject this claim as there is no basis for finding misfeasance in public office in the instant case.

A [104] The tort of misfeasance in public office relates to deliberate dishonest conduct and abuse of power by a public officer. The key ingredients of the tort are:

(a) an abuse of public power or authority by a public officer;

B (b) who either: (i) knew that he was abusing his public power or authority; or (ii) was recklessly indifferent as to the limits of his public power or authority; and

(c) who acted or omitted to act either with: (i) the intention of harming the plaintiff (targeted malice); or (ii) with the knowledge of the probability of harming the plaintiff, or with C reckless indifference to the probability of harming the plaintiff.

[105] In *Tony Pua Kiam Wee v. Government of Malaysia and another appeal* [2019] 12 MLJ 1 at p 47j [2020] 1 CLJ 337 at p 385, the Federal Court said:

> D It is therefore an intentional tort. The element which receives the most emphasis is that of bad faith, *ie*, the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. It is also the element which makes this tort hard to plead and to prove as it is only E in rare circumstances that such facts subsist as would allow the plea to remain on the record. In many instances the plea is struck out as it is simply insufficient. This is because, it is not every act or omission on the part of a public officer which lends itself to the bringing of an action premised on this tort. It requires outrageous conduct with the requisite F intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated.

[106] In my view, elements of 'outrageous conduct', 'bad faith' or 'abuse of power' on the part of the defendants and 'targeted malice' against the deceased are absent here. As explained in *Tony Pua*, not every action or omission by a public officer can be the basis to claim G misfeasance of public office. The plaintiffs cited *Ketua Polis Negara & Ors v. Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184: [2017] 6 MLRA 635. However, that case does not apply in this instance. On the facts here, there is no evidence of any assault or battery inflicted against the deceased. H There was no physical abuse, torture or violence against the deceased. There were no continuous or repeated attempts by the defendants to hide the cause of death of the deceased and the persons responsible. Nor were there failure on the part of the defendants to inform P1 of the location of the deceased after his arrest or to provide her with access to the deceased. I

[141] On the facts of this present case, I cannot conclude that there has been an element of outrageous conduct, bad faith, abuse of power or targeted malice to support this intentional tort of misfeasance in public office. The plaintiff at para. 32 of the written submission submits that upon inspection of the deceased's body, she found a "kesan tumbukan" on the deceased's forehead. The plaintiff also attempted to adduce some evidence from the post-mortem report that the deceased had multiple healed skin lesions. However, a perusal of the said medical report does not state that such skin lesions resulted from any external force. Therefore, as such, I find that the plaintiff has failed to prove that there were injuries inflicted on the deceased by the defendants.

[142] In the upshot, I find that the plaintiff has failed to prove its claim of misfeasance in public office. In addition and in any event, during oral submissions, learned counsel for the plaintiff has conceded that there was insufficient evidence in this matter to sustain a claim for misfeasance in public office.

Issue No. 7: Whether The 11th Defendant Should Be Held Vicariously Liable

[143] Having concluded that the first to sixth defendants have been negligent, the next issue to consider is whether the Government of Malaysia (the 11th defendant) should be held vicariously liable. The plaintiff submits that by virtue of being the employer of the first to sixth defendants, the 11th defendant's vicarious liability is established.

[144] Learned counsel for the plaintiff submits that had the purpose and intent of the perintah tetap been adhered to by the defendants, the deceased's death could have been avoided. The defendants' witnesses have admitted that this perintah tetap needed to be adhered to strictly. It is rather unfortunate that the police officers in this case, in discharging their duties as mandated by the Police Act 1967 and all the other regulations, had failed to comply with the same. These safeguards had, in my view, been put in place to avoid any mishaps such as the incident in this case.

[145] Learned counsel for the plaintiff submits that based on the above, ss. 5 and 6 of the Government Proceedings Act 1956 are fulfilled and the Government of Malaysia (the 11th defendant) ought to be held vicariously liable for the defendants' negligence in this case.

[146] In determining if the plaintiff is successful in proving the claim of vicarious liability, it is apt that I refer to both ss. 5 and 6 of the Government Proceedings Act 1956, which reads as follows:

> 5. Liability of the Government in tort
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default

committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

6. Limits of liability of the Government

(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

(2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.

(3) No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

(4) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

(5) For the purposes of subsection (4) the expression "appropriate financial officer" means, in respect of the Federal Government, the Minister of Finance, and in respect of the Government of a State, the State Financial Officer, and, in the case of the States of Sabah and Sarawak, the State Minister responsible for finance.

[147] Learned SFC at paras. 64 to 66 of their submission refers to the cases of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 and *Bala Krishnan Appala Naidu v. Ketua Inspektor Prabakaran Shanmugam & Ors (No 2)* [2011] 2 CLJ 890 to support their contention that the 11th defendant should not be held vicariously liable as the plaintiff had failed to establish personal liability of the tortfeasors named *ie*, the first to tenth defendants.

[148] The Federal Court in the case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 held as follows:

> [16] Therefore, on the proper construction of ss 5 and 6, in any claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability be established before the government can be made liable vicariously as principal ...

[149] Reference is also made to the case of *Bala Krishnan Appala Naidu v. Ketua Inspektor Prabakaran Shanmugam & Ors (No 2)* [2011] 2 CLJ 890, where the High Court held as follows:

> In other words, vicarious liability against the Government of Malaysia as the principal will arise only if the public officer who is named as a party is found to be liable for the tortious act. The Government of Malaysia can only be vicariously liable pursuant to ss. 5 and 6 of the Government Proceedings Act and not as a tortfeaser and this will only arise if the public officer is found to be liable for the tortious act. The success of the plaintiff would depend on establishing personal liability of the tortfeasor, in the present case, the Investigation Officer; being the public officer. The Government of Malaysia is not in any sense a tortfeasor.

[150] Applying both ss. 5 and 6 of the Government Proceedings Act 1956 as well as the cases of *Lay Kee Tee* (*supra*) and *Bala Krishnan Appala Naidu* (*supra*) and since the plaintiff herein has named the actual tortfeasors in this case, I am of the considered view that having established that the first to sixth defendants were negligent in their duties leading to the death of the deceased, I would consequently find that the 11th defendant is vicariously liable pursuant to ss. 5 and 6 of the Government Proceedings Act 1956.

Issue No. 8: Are The Defendants Liable To Pay Damages As Pleaded In The Statement Of Claim

[151] To recap, the plaintiff seeks the following:

(i) dependency claim;

(ii) bereavement;

(iii) general damages;

(iv) aggravated damages;

(v) special damages.

[152] I will consider these claims for damages separately below.

Dependency Claim

[153] The plaintiff submits that it has been proved on a balance of probabilities that the deceased had been gainfully employed prior to his death and that the requirements of ss. 7(2) and 7(3)(iv)(d) of the Civil Law Act 1956 are satisfied. (See the case of *Loh Hee Thuan v. Mohd Zani Abdullah* [2003] 1 CLJ 410; [2003] 1 MLJ 213).

[154] To this end, the plaintiff sought to rely on the testimony of the plaintiff's witnesses, whose testimony is summarised as follows:

(i) the plaintiff herself testified as SP1 that the deceased had worked as a part-time fisherman and a grave digger and the deceased would receive a sum of around RM3,500 per month from both jobs in the form of cash payment and would give SP1 around RM1,000 to RM1,500 a month for household expenses and for the care of his younger siblings.

(ii) SP2, Pengerusi Surau Kampung Perlis, Butterworth testified that the deceased had been employed as a grave digger and grave cleaner and as a grave cleaner, the deceased was paid an allowance of RM250 a month, and an additional approximately RM150 by way of a gratuitous payment by family members to dig a grave whenever there is a death in the village. In this respect, the evidence of the RM150 was hearsay and, in any event, he testified that there were very few funerals a year.

(iii) SP3, the older brother of the deceased testified that the deceased was making a living as a part-time fisherman and a grave digger but he could not say how much was earned save for the fact that the deceased would give the plaintiff some money each month.

[155] Based on the above, learned counsel for the plaintiff submitted that the multiplier as per s. 7(3)(iv)(d) of the CLA 1956 is 16 years. As for the multiplicand, since SP1 had testified that the deceased would give her about RM1,000 to RM1,500 a month for her household expenses, including expenses for the deceased's younger siblings, learned counsel submits that the multiplicand should be RM18,000 per year and therefore seeks a sum of RM288,000 being RM18,000 per year for 16 years.

[156] The defendants on the other hand and in my view correctly pointed out that there is no substantive evidence to support such dependency claim. To this end, learned SFC for the defendants relies on the cases of *Lee Sau Kong v. Leow Cheng Chiang* [1960] CLJU 56; [1960] 1 LNS 56, *Chan Wey Siong lwn. Ketua Inspektor Sjafrin Oktridal Sjofjan & Satu Lagi* [2004] 3 CLJ 180, *Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor* [1999] CLJU 83; [1999] 1 LNS 83; [1999] 6 MLJ 800, *Kunasekaran Renggaga v. ASP Heisham Harun, Ketua Balai Polis Bukit Sentosa & Ors* [2012] 4 CLJ 237 and *Sushila Rani Ramasamy lwn. Kerajaan Malaysia & Yang Lain* [2023] CLJU 1358; [2023] 1 LNS 1358 to support their contention that the burden is on the plaintiff to prove her claim which she has failed to do so without any supporting documentary evidence.

[157] I agree. In my view, apart from the bare testimony of the plaintiff, there is certainly no other independent evidence to support the fact that the deceased was earning about RM3,500 a month or the plaintiff's claim for RM1,500 per month. However, does that mean that the plaintiff is entitled to nothing at all? In this regard, I refer to the case of *Muhammad Norazri Abdul Aziz & Anor v. Abdul Rani Hassan & Anor* [2020] CLJU 216, where the High Court held as follows:

> This Court cannot ignore the pulse of society even if it does not partake in the everyday activities of society. Law must reflect the wishes of the people governed by grund norms. Interpretation of law too, is not made in ivory towers nor in the comfort of classrooms. This Court takes note that the deceased, a Malay Muslim man of about 25 years old and unmarried. It is customary for unmarried man to contribute to the parents a portion of their income as a show of gratitude for their sacrifice in bring them up. The "filial son" concept is an accepted norm and this Court gives recognition to that. I take note that the Respondents being parents to the deceased, have a regular income themselves and hence in the view of the Learned Counsel for the Appellant, is not in need of any contribution from the deceased.
>
> I find that the contribution of RM1,600 a month to the parents nothing unusual and in fact, it is to be expected of the deceased.

[158] Applying the filial son concept as enunciated in the case of *Muhammad Norazri Abdul Aziz* (*supra*), I am prepared to accept that the deceased was indeed receiving earnings and that it was likely that he would give his mother some money monthly to account for expenses. However, I am certainly not prepared to conclude on the evidence before me that the deceased earned RM3,500 per month and had given the plaintiff RM1,500 per month. In my view, it is more likely and probable that the deceased was earning about RM1,000 to RM1,500 a month and of this, it is probable that he would have given his mother some funds every month and I would have thought that a sum of RM300 would be a reasonable sum that he would have given to the plaintiff. This was also the figure arrived at by the court in the case of *Kunasekaran* (*supra*).

[159] As such, I would award a sum of RM57,600 under this head (RM300 x 12 x 16 years). See also the case of *Janagi Nadarajah & Anor v. Sjn Razali Budin & Ors* [2021] 10 CLJ 915; [2021] MLJU 2023.

Bereavement

[160] The plaintiff, as the mother of the deceased, also sought to claim for damages for bereavement of RM30,000 under s. 7(3A) of the Civil Law Act 1956 and given that the plaintiff is entitled to award such a sum, I will allow the award of damages for bereavement. *Janagi Nadarajah & Anor v. Sjn Razali Budin & Ors* [2021] 10 CLJ 915; [2021] MLJU 2023.

General Damages

Misfeasance In Public Office

[161] The plaintiff seeks a sum of RM100,000 as damages for misfeasance and relies on the cases of *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585; [2017] 6 MLRA 635 and *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 6 MLRA 432. However, having concluded earlier that misfeasance was not proven but only negligence, there is no basis to award damages for misfeasance in public office.

Aggravated Damages

[162] The plaintiff had pleaded at para. 39 of their statement of claim for this head of damages to be awarded by this Honourable Court and submits that she is entitled to a sum of RM250,000.

[163] The plaintiff submits that she is entitled to aggravated damages due to the abhorrent nature of the defendants' negligence and omissions and relies on the Federal Court case of *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLRA 424 to support such contentions.

[164] The defendants, on the other hand, contend that the award of aggravated damages is for compensation for the injured feelings of the deceased.

[165] To this end, the defendants rely on the case of *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39; [1996] 3 MLJ 337, where it was held as follows:

> This category of damages is described as (per Lord Diplock in *Broome v. Cassell & Co Ltd* [1972] AC 1027 at p 1124):
>
> > ... compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. It is to compensate the plaintiff for injuries affecting his feelings arising out of the tortious acts of the defendants. In assessing this, all circumstances of the case must be taken into account, including the character of the plaintiff: see Edmund Davis LJ in *Ansell v. Thomas* [1974] Crim LR 31.

[166] Reference is also made to the case of *Sanmarkan Ganapathy & Anor v. Dato' Dr V Thuraisingham & Ors* [2011] CLJU 1090; [2011] 1 LNS 1090; [2012] 3 MLJ 817, where it was held as follows:

> [42] Aggravated damage as expressed in *MC Gregor on Damages* (15th Ed), at pp 409-410 means:
>
> > ... aggravated damage – that is, as cases of extra compensation to the plaintiff for the injury to his feelings and dignity.
>
> [43] Such damage is considered where there is outrage to person or property and it is to compensate for the injury to the feelings and dignity or pride. There is in the instant case, no such pleading nor evidence as to any outrageous act to the deceased nor any injury to the feelings and dignity of the deceased. The plaintiffs therefore are not entitled to this claim.

[167] It is the defendants' submission that the plaintiff is not entitled to claim for aggravated damages as the deceased hung himself as there were no physical act by any of the defendants, which have caused any injury to the feelings and dignity of the deceased.

[168] However, in my view, as found earlier, the defendants' actions/omissions had led to the death of the deceased despite the fact that it could have been avoided had they complied with all the necessary rules, regulations and standard operating procedures and if the defendants had not been negligent or in breach of their duty of care. (See the case of *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15).

[169] Further, a relevant factor to be considered is that the extent of the infringement is more in the nature of negligent acts or omissions, rather than any deliberate withholding of medicine or positive acts of torture or injury inflicted on the deceased (see the dissenting judgment of Her Ladyship Nallini Pathmanathan FCJ at para. 133 of the Federal Court judgment in *Koperal Zainal* (*supra*)).

[170] In the present case, the deceased had died due to the omissions and negligence of the police, where the death of the deceased could have been avoided had they carried out their duties/not breached their duty of care. As such, I find that the plaintiff is entitled to aggravated damages as the defendants' omissions in failing to prevent the suicide caused grief to the plaintiff. As such, guided by the case of *Koperal Zainal Mohd Ali* (*supra*), I find that the plaintiff is entitled to the award of aggravated damages and would award a sum of RM50,000 under this head, which I find to be a fair and reasonable sum based on the facts of this case.

Special Damages

[171] Under s. 7(3)(ii) of the Civil Law Act, damages may be awarded in respect of the funeral expenses of the deceased. In this case, the plaintiff sought the court's judicial notice that the plaintiff would have incurred costs for funeral expenses. The plaintiff in this case claims a sum of RM10,000 for funeral expenses but no receipts were adduced during the trial to prove that this sum had been incurred as funeral expenses.

[172] The plaintiff also claims the sum of RM5,500 as costs incurred for obtaining the letters of administration.

[173] In addition, the plaintiff claims a sum of RM10,000 for the following travelling costs.

[174] To this end, the plaintiff relies on the cases of *Farah Ahmed Naji Al-Sahhaf v. Dr Lee Weng Seng & Ors* [2022] CLJU 3340; [2022] 1 LNS 3340; [2017] MLRHU 1761, *Nur Syarafina Sa'ari v. Kerajaan Malaysia & Ors* [2019] 9 CLJ 246; [2019] 12 MLJ 741 and *Hasniyati Hassan & Anor v. Kerajaan Malaysia* [2022] 7 CLJ 565; [2022] MLJU 376 to support her contention that the plaintiff, as an ordinary lay person, does not carry on with her lives tediously, collecting receipts for the sole purpose of producing them in court later. These travel and other expenses had been incurred by the plaintiff and are reasonably expected to be incurred by the plaintiff in the circumstances of this case.

[175] Be that as it may, I take judicial notice and am prepared to accept that funeral expenses would inevitably be incurred as well as travelling costs and the costs for obtaining the letters of administration. However, I found the specific amounts claimed to be on the high side. As for funeral expenses, learned SFC has intimated that a sum of RM3,000 would be reasonable and I would so award. As for the claim of RM5,500 as costs incurred for obtaining the grant of letters of administration, I would award a sum of RM5,000. Finally, I would acknowledge that certainly, travelling costs would have been incurred by the plaintiff as highlighted and would award a sum of RM2,000 in respect of the same.

Conclusion

[176] In the upshot, upon a careful and judicious consideration of the facts, evidence and the applicable law as highlighted above, I am of the view that the plaintiff has successfully proven on a balance of probabilities her pleaded case of negligence against the first to sixth defendants and/but the claim of misfeasance in public office not so proven. The claim against the seventh to tenth defendants hereby dismissed. The court also finds that the 11th defendant is vicariously liable in respect of the negligence of the first to sixth defendants.

[177] As for costs, I order the defendants to pay the plaintiff costs of RM50,000, which I consider fair and reasonable under all the circumstances of this case.